No. 75-1514

In the Supreme Court of the United States

OCTOBER TERM, 1975

BERNARD M. PESKIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner Bernard M. Peskin, defendant-appellant in the court below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case.

Opinion Below

The opinion of the Seventh Circuit is reported at 527 F.2d 71 (7th Cir. 1975), and is printed in Appendix 1.

Jurisdiction

The opinion and judgment of the Court of Appeals for the Seventh Circuit were entered on December 10, 1975. A timely petition for re-hearing was denied on March 8, 1976 and the judgment became final on that date. The Court's judgment of December 10, 1975 and its order of March 8, 1976 are attached hereto as Appendices 2 and 3. This Court's order of March 29, 1976 extending the time for filing a petition for writ of certiorari is attached as Appendix 4.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Does a combination of two erroneous and contradictory evidentiary rulings which virtually foreclosed petitioner from presenting his defense, along with erroneous jury instructions which unfairly shifted the burden of proof to petitioner, and a statement by the trial judge to the jury after they had been deliberating two and one-half days that they would be allowed only one-half hour more to deliberate and return a verdict on all counts, deviate so far from accepted standards of fairness and due process of law that this Court should exercise its supervisory powers and reverse petitioner's conviction?

2. Can interstate transfers of funds by a co-conspirator corporation to one of its local subsidiaries which had previously, through intrastate checks, reimbursed petitioner for funds advanced by him allegedly as bribes to public officials, suffice as the jurisdictional base for charges under 18 U.S.C. §1952, when those checks were not involved in making alleged unlawful payments to public officials, and the intercorporate transfers were unknown and immaterial to petitioner, unimportant to the alleged bribery plan, and no acts in violation of state law occurred after the interstate transfers?

3. Did the IRS deliberately attempt to circumvent the requirement in the Seventh Circuit, and the IRS' own written policy—that a taxpayer who is the subject of an Intelligence Division investigation be warned of his rights—by sending a Revenue agent to conduct a "civil re-audit" of petitioner's tax returns as a subterfuge to lull petitioner into voluntarily providing information for use in pending criminal investigations of which petitioner was unaware? If so, should the evidence so obtained be suppressed?

Constitutional Provisions and Statutes Involved

The Fifth Amendment to the United States Constitution provides in part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

The Sixth Amendment to the United States Constitution provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . to be confronted with the witnesses against him . . . ."

18 U.S.C. §1952 provides in pertinent part:

> "(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> "(1) distribute the proceeds of any unlawful activity; or
>
> "(2) commit any crime of violence to further any unlawful activity; or
>
> "(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both."

Chapter 38, §33-1(c), Ill. Rev. Stat. (1967), provides in pertinent part:

"A person commits bribery when:

"(c) With intent to cause any person to influence the performance of any act related to the employment or function of any public officer, public employee or juror, he promises or tenders to that person any property or personal advantage which he is not authorized by law to accept. . . ."

STATEMENT OF THE CASE

Petitioner was convicted by a jury on five counts of violating the Travel Act (18 U.S.C. § 1952),* one count of conspiracy to violate the Travel Act (18 U.S.C. § 371), and one count of making false statements on his partnership tax return (26 U.S.C. § 7206(1)).**

This case involves the payment of money in 1968 by petitioner to officials of the Village of Hoffman Estates, Illinois in connection with a petition for zoning change on a parcel of land owned by Kaufman & Broad, Inc. ("K&B"), a nationwide developer and home builder. Petitioner acted as K&B's attorney in the rezoning proceedings.

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* The Travel Act provides (*inter alia*) that it is a federal crime for a person to use a facility in interstate commerce with intent to commit or facilitate the offense of bribery in violation of state law, and thereafter commit or facilitate the offense of bribery. See *Rewis* v. *United States,* 401 U.S. 808 (1971).

**At the close of the government's case, the trial court dismissed four other counts alleging violations of the Travel Act. The jury found petitioner not guilty of two Travel Act counts and one count charging income tax evasion.

We set forth in parts (1) through (4) below the facts relating to the trial court's evidentiary rulings and instructions to the jury, which we submit deviated so far from the standards enunciated by this Court that petitioner's trial lacked all semblance of the fairness guaranteed by the Constitution to defendants in criminal cases. In Part (5) we summarize the facts relating to the alleged jurisdictional basis for Travel Act Counts 6 through 9, which we submit are insufficient as a matter of law. The facts regarding petitioner's motion to suppress evidence based upon the deceitful conduct of the Internal Revenue Service are lengthy and complex; hence we have included these facts in Appendix 5 to this brief (pp. App. 34 to 48).

(1)

The limitations placed on cross-examination of the village trustees.

The former Mayor and three former trustees of the Village of Hoffman Estates testified, as government witnesses, that in 1968 they received cash in exchange for their favorable votes on the K&B rezoning. Former Mayor Roy Jenkins testified that he obtained the cash from petitioner and distributed it among his three fellow trustees. Jenkins testified that petitioner instigated the subject of the bribe and that he (Jenkins) was "shocked" by the suggestion. The trustees attempted to give the jury the impression that they were tempted and finally succumbed—that they strayed from the path of rectitude as a result of the cash tendered by petitioner to Jenkins and by Jenkins to the others.

Petitioner conceded he paid the cash to Jenkins on K&B's behalf, but he contended* that he did so without

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* Petitioner did not testify at the trial because of an evidentiary ruling discussed in part (2) below. Defense counsel made an offer of proof detailing the testimony petitioner desired and intended to give. (Tr. 1572-74.)

the requisite criminal intent to bribe them; instead he paid the money in response to Jenkins' extortionate demands and Jenkins' threats that there would be no fair consideration of the merits of K&B's zoning proposal, which was doomed to failure unless the trustees were paid.

In an effort to undermine the trustees' testimony and to unmask them for what they really were, petitioner sought to cross-examine them about the fact that, starting long before K&B presented its zoning proposal, the zoning officials had extorted money and other considerations from many developers through an extended, sophisticated pattern of conduct which was still in progress in 1968: every builder who sought a substantial zoning change in Hoffman Estates had to pay the trustees for their favorable votes. The facts supporting this proposed cross-examination are found in the trustees' statements to the government, produced for defense counsel under 18 U.S.C. §3500.

The trial judge flatly refused to permit cross-examination about the trustees' self-admitted program of extortion. Instead, he allowed defense counsel to ask each trustee only the single question of whether, before the K&B incident, he had ever accepted a payment for his vote; each trustee answered yes, and the matter rested there.* The trial judge refused to permit the trustees to be asked about the number of times, the amounts,

* The trial judge himself asked Mayor Jenkins whether he had ever received a "bribe" before. Later, he allowed defense counsel to rephrase the question using the word "money" instead of the word "bribe," and the government stipulated that Jenkins' answer to the question would be "yes." (Tr. 1044.) But the damage created in the minds of the jury by the Court's inference had already been done.

or any other facts relating to the other payments. Petitioner submitted an offer of proof setting forth the established pattern of extortions engaged in by the trustees,* but the jury was never informed of the true facts about the village officials, petitioner's accusers and alleged co-conspirators, and the case went to the jury with the trustees still in the role of fallen angels who had been corrupted by petitioner.

(2)

The inconsistent and inherently unfair ruling regarding cross-examination of petitioner.

Petitioner wished to take the stand on his own behalf to deny the testimony of government witnesses and to give his version of the relevant events.** Petitioner could not testify, however, because of the coercive effect of another ruling by the trial judge—which was inconsistent with his restrictive ruling on cross-examination of the trustees. The judge ruled that if petitioner took the stand and claimed he was the victim of the trustees' extortion (which is the testimony petitioner intended to give), he could be cross-examined about a totally unrelated alleged payment of money on behalf of K&B to an employee of another governmental agency, unrelated to the Village of Hoffman Estates, which occurred 2½ years *after* the

* Petitioner also offered to prove in his case-in-chief—through other former trustees and developers—the rampant program of extortion perpetrated by the government's trustee-witnesses during the mid and late 1960's.

** For example, petitioner wished to deny Jenkins' testimony that petitioner first raised the matter of a cash payment. The trial judge instructed the jury that it was relevant "whether Peskin or Jenkins first raised the question of money," but the jury heard only Jenkins' version of the conversation.

payment by petitioner to Hoffman Estates officials. The trial court's ruling was that "intent" was the primary issue in the case, and that somehow one alleged similar act in May, 1971 could shed light on petitioner's state of mind in October, 1968. Rather than incur the prejudice which would result from this line of questioning, petitioner did not testify and instead made an offer of proof as to the testimony he wanted to give.

(3)

The trial court's instructions which put the burden of proof on petitioner.

Petitioner's inability to testify was all the more devastating because the trial court's instructions to the jury erroneously shifted the burden of proof to petitioner to negate criminal intent, and to prove that he did not know the contents of the tax return he signed. These instructions are set out in the opinion of the Court of Appeals (App. 22-23, 29).

(4)

The trial court's coercion of the jury's verdict.

Despite the trial court's evidentiary rulings and instructions, which severely restricted petitioner in his efforts to present his defense, the jury encountered great difficulty in resolving the issues. The jury deliberated for two and one-half days (including night sessions until approximately 10:00 p.m.) without reaching a verdict. Finally, at 9:30 p.m. on the third day, the trial judge told counsel he intended to discharge the jury at 10:00 p.m. if they had not arrived at a verdict. The judge then called the jury in and learned from the foreman that they had

not yet reached a verdict. The trial judge then asked (Tr. 1938):

> "Do you think that if you were allowed to deliberate, let's say another half hour—and I don't intend to keep you in there any longer than that—you might reach a verdict as to all of the counts in the indictment?"

The foreman answered "Yes." The judge asked if the foreman believed "you are close to a verdict on the complete indictment then?" The foreman responded "Possibly." The trial judge then asked for a show of hands from jurors who thought ". . . it would be profitable and possible to reach a complete agreement on all counts of the indictment if you deliberated until 10 o'clock?" After the show of hands, the judge said: "Well, we can do that then. If you will retire again, we will call you out again at 10 o'clock."

Approximately 30 minutes later, at 10 p.m., the jury announced its verdict on all counts, including inexplicably inconsistent verdicts between two inter-related tax counts (not guilty of Count 15, attempt to evade personal tax; guilty of Count 16, filing a false partnership return).

(5)

The facts which the government contends provide the jurisdictional support for Travel Act Counts 6 through 9.

Five of the counts on which petitioner was convicted are brought under the Travel Act, 18 U.S.C. § 1952, and a sixth count is conspiracy to violate the Travel Act. That Act makes it a crime to use "any facility in interstate . . . commerce . . . with intent to" facilitate a violation of the Illinois bribery statute, and thereafter to violate the bribery statute. The facts upon which

the Court of Appeals upheld these convictions are the following:

Petitioner paid cash to Mayor Jenkins and Jenkins in turn distributed the cash among his fellow trustees. Petitioner then sent K&B bills for legal services, which included (but did not disclose) the amounts of cash petitioner had paid to Jenkins.

Petitioner's bills were sent to and paid by intrastate checks of K&B's Illinois subsidiary, located in Illinois. The subsidiary's bank account then was replenished by inter-corporate transfers of funds from the K&B parent company located in Detroit, Michigan. The interstate checks did not go to petitioner: petitioner never saw or even knew of the parent company's checks. The courts below held these inter-corporate checks were sufficient to satisfy the jurisdictional requirements of Travel Act Counts 6 through 9. As to Count 5, the courts below held that one interstate airplane journey by an employee of K&B, from Detroit to Chicago, was sufficient to satisfy the Travel Act, because one of his purposes was to confer with petitioner about the Hoffman Estates zoning matter, although the employee came to Chicago almost weekly on a variety of K&B matters. Count 1 is a charge of conspiracy to violate the Travel Act.

REASONS FOR GRANTING THE WRIT

I.

THE COMBINATION OF THE ERRONEOUS EVIDENTIARY RULINGS AND JURY INSTRUCTIONS, AND THE COERCION OF THE VERDICT, DEPRIVED PETITIONER OF FUNDAMENTAL CONSTITUTIONAL RIGHTS.

The decision of the Court of Appeals is in conflict with rulings of this Court, of other Courts of Appeal and of the Seventh Circuit itself. Petitioner was deprived of a fair opportunity to face and cross-examine his accusers, and to testify on his own behalf, in violation of his rights under the 6th Amendment. The jury instructions improperly shifted the burden of proof to petitioner. And at the end of the trial, the trial judge put a 30-minute time limit on the jury to reach a verdict on all counts, thus coercing the verdict from the jury after two full days and three nights of deliberation.

The petition for writ of certiorari should be granted in order to correct the errors and resolve the conflicts enumerated below, and pursuant to the overall supervisory powers of this Court.

1. Defense counsel was entitled to cross-examine the trustees, petitioner's accusers and alleged co-conspirators, about their prior and contemporaneous illegal acts of extortion in order (1) to reflect on their credibility generally,*

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* *Cf. Gordon* v. *United States,* 344 U.S. 414, 421-23 (1953); *United States* v. *Dickens,* 417 F.2d 958, 959-60 (8th Cir. 1969); Rule 608(b), Federal Rules of Evidence.

(2) to counter their testimony that they were concerned only about the merits of K&B's zoning proposal but were enticed by petitioner's cash bribe offer—which Jenkins said "shocked" him, (3) to show that it was Jenkins, and not petitioner (as Jenkins claimed), who first raised the matter of a cash payment,* and (4) to shed light on petitioner's state of mind and intent at the time he paid the money to Jenkins.**

2. The government should not have been allowed to cross-examine petitioner about the unrelated, later alleged bribe incident, because (1) it was totally irrelevant to the issues on trial, but extremely prejudicial, (2) it impaired petitioner's exercise of his constitutional right to testify on his own behalf, and (3) even if slightly relevant (which we deny), the prejudicial effect far outweighed relevance.***

This Court's decision in *Chambers* v. *Mississippi*, 410 U.S. 284 (1973), is controlling here. There, as here, a defendant was subjected to the doubly-prejudicial effect of improper limitations on cross-examination of government witnesses and his own direct examination of defense witnesses. This Court said that "[T]he rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process," and that a "significant diminution" of these

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* *Cf. Griffin* v. *United States*, 336 U.S. 704, 718 (1940); *Campbell* v. *Illinois*, 16 Ill. 16, 17 (1854); 1 Wigmore on Evidence §110.

** *See United States* v. *Kahn*, 472 F.2d 272, 277-78 (2d Cir. 1973), *cert. denied*, 411 U.S. 982; *United States* v. *Barash*, 365 F.2d 395, 401-02 (2d Cir. 1966), *cert. denied*, 396 U.S. 832; *United States* v. *Deardorff*, 343 F. Supp. 1047, 1050 (S.D.N.Y. 1971).

*** *See Boyd* v. *United States*, 142 U.S. 450, 458 (1892); *United States* v. *Phillips*, 401 F.2d 301, 306 (7th Cir. 1968); *White* v. *United States*, 294 F.2d 952, 953 (9th Cir. 1961).

rights "calls into question the ultimate integrity of the fact-finding process . . ." (410 U.S. at 294-95).

3. The prejudice resulting from these tandem rulings was heightened by two jury instructions:

(a) As to the Travel Act Counts, the jury was instructed that in determining whether petitioner "was a victim of extortion, such as to negate his alleged criminal intent, it is relevant, but not controlling whether [petitioner] or Jenkins first raised the question of money." Because of the ruling on cross-examination of petitioner, he did not take the stand and thus was unable to deny Jenkins' testimony that petitioner "first raised the question of money."

The trial court refused the defense instructions on this subject, which we have set out in Appendix 6 to this brief (App. 49).

(b) On the tax counts, the trial judge instructed the jury that it could infer from petitioner's signatures on the tax returns that "he had knowledge of the contents," and this inference was permissible "unless and until outweighed by evidence in the case which leads you to a different or contrary conclusion." Not only does the instruction impermissibly impose the burden of proof on petitioner, rather than on the government, but also, as in the instance in (a) above, the only available contrary evidence of petitioner's knowledge was never heard by the jury because petitioner was kept from the witness stand by the trial judge's erroneous ruling concerning cross-examination.

4. The final blow to the defense came after the jury had been considering the case for two and one-half days. At 9:30 p.m. on the third day, the trial judge pressed the jury to return a verdict on "all counts of the indictment"

within 30 minutes. The verdict was rendered in almost precisely the time fixed.*

Perhaps no one of the errors outlined above would be sufficient to induce this Court to intervene. But the combination and cumulative effect of such serious errors—including denial of fundamental constitutional rights—surely calls for this Court to exercise its supervisory powers. It is, after all, one of the major functions of this Court to protect defendants in criminal cases from violations of their constitutional rights, and to supervise the various Courts of Appeal in the decisions they render in federal criminal cases.

II.

THE COURT OF APPEALS' DECISION ON THE TRAVEL ACT COUNTS IS IN CONFLICT WITH RULINGS OF THIS COURT AND OF COURTS OF APPEALS.

A.

We have summarized above the slender factual reed upon which the Court of Appeals upheld the Travel Act convictions, Counts 1** and 5 through 9. The ruling that those facts are sufficient to form a jurisdictional basis under 18 U.S.C. §1952 is contrary to the philosophy ex-

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* *See People* v. *Crowley,* 101 Cal. App. 2d 71, 224 P.2d 748, 753 (1950).

** The conspiracy count (Count 1) should fall with the Travel Act counts upon which it rests because without the Travel Act charges, there is no jurisdictional base to support it. Petitioner should be granted a new trial on the only remaining count (Count 16) alleging a material misstatement on his partnership tax return, because the trial was dominated by the highly prejudicial Travel Act charges and because of the tax count instruction given by the trial judge, discussed in 3(b) above.

pressed by this Court in *Rewis* v. *United States,* 401 U.S. 808 (1971), and to the holdings of the Second Circuit in *United States* v. *Archer,* 486 F.2d 670, 678-686 (2d Cir. 1973) and of the Seventh Circuit itself in *United States* v. *Altobella,* 442 F.2d 310, 316 (7th Cir. 1971) and *United States* v. *Isaacs,* 493 F.2d 1124, 1146-49 (7th Cir. 1974),* *cert. denied,* 417 U.S. 976. Those cases demonstrate that a remote and peripheral use of interstate facilities will not trigger application of the Travel Act. The issue in *Archer, Altobella* and *Isaacs* was "whether the defendants here have used a facility in interstate or foreign commerce . . . in a sufficiently meaningful way to subject themselves to liability under the statute." (486 F.2d at 680.) In each of the three cases it was held that the use of interstate commerce was insufficient to support jurisdiction under the Travel Act.

Both *Altobella* and *Isaacs* involved more proximate and direct use of interstate check facilities than the case at bar. In *Altobella,* the extortion victim cashed a check to obtain cash to pay defendant, and the check traveled interstate.** In *Isaacs,* the proceeds of the unlawful activity

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* The judges who decided the *Isaacs-Kerner* case were from outside the Seventh Circuit, sitting by special designation of the Chief Justice of this Court.

** In *Altobella,* Mr. Justice Stevens said (442 F.2d at 314-316):

"To warrant federal intervention we believe the statute requires a more significant use of a facility of interstate commerce in aid of the defendants' unlawful activity than is reflected on this record."

* * *

"We do not believe Congress intended to authorize federal intervention in local law enforcement in a marginal case such as this. We are guided by the Supreme Court's admonition 'that in ascertaining the scope of congressional legislation a due regard for a proper adjustment of the local and national interests in our federal scheme must always be in the background. . . .'"

were distributed by checks which traveled interstate. *Archer* involved interstate telephone calls made by an undercover government agent to the defendant.

In contrast, in the case at bar, Mayor Jenkins testified that petitioner made a cash payment to Jenkins, who distributed the cash among the other trustees. Thereafter, petitioner was reimbursed by the K&B Illinois subsidiary, whose bank account was then replenished by K&B in Detroit by use of interstate checks.

Thus, the interstate checks were *not* used to raise cash to make payments to the village officials; they were *not* made payable to petitioner; they were *not* sent to petitioner; they were *not* known to or foreseen by petitioner; they played no part in any unlawful activity; and they traveled interstate *after* the alleged unlawful activity had been completed, from the K&B parent to its subsidiary, solely in order to reimburse the subsidiary for funds previously sent *intrastate* to petitioner. It did not matter to petitioner or to the alleged unlawful activity when, how or even whether the bank account of the K&B subsidiary was replenished.

There is a direct conflict between the decisions in the cited cases and the ruling in petitioner's case, which should be resolved by this Court. And quite apart from that conflict, an important policy question is presented as to how far this Court will permit lower courts to stretch the boundaries of 18 U.S.C. §1952 to encompass what are essentially local criminal matters involving minimal, peripheral use of interstate facilities. Compare *Rewis* v. *United States*, 401 U.S. 808 (1971); see also *United States* v. *Maze*, 414 U.S. 395 (1974).

B.

There is another point of conflict between the ruling below and a prior decision of the Seventh Circuit, which tenders to this Court an important policy issue of first impression. The statute requires that the performance of the alleged "unlawful activity," must occur *after* use of the interstate facilities, which in this case is the violation of the Illinois bribery statute. The undisputed evidence here was that the money was paid to the village officials—and the unlawful activity was therefore concluded—before the inter-company checks traveled in interstate commerce.

The "unlawful activity" and the use of interstate facilities ocurred in reverse order, and not in the sequence required by the Travel Act.

The Seventh Circuit has previously ruled that this sequence is jurisdictional, holding that the " 'thereafter' clause constitutes an express limitation on the coverage of the statute." *United States* v. *Zemater*, 501 F.2d 540, 544 (7th Cir. 1974).* The opinion in the case at bar conflicts with the holding in *Zemater* and with the express language of the statute.

III.

EVIDENCE GATHERED BY THE INTERNAL REVENUE SERVICE IN VIOLATION OF PETITIONER'S RIGHTS SHOULD HAVE BEEN SUPPRESSED.

Prior to and following the trial, a hearing was held on petitioner's motion to suppress evidence gathered by the

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* Mr. Justice Stevens concurred in the Per Curiam opinion in *Zemater*.

Internal Revenue Service. Petitioner based his motion on the following facts.*

(1) At the same time that petitioner was under criminal investigation—by the United States Attorneys' office and the grand jury, and by three different sections of the IRS—a Revenue Agent of the IRS was assigned to and conducted one of the most extraordinary "civil" re-audits that two experienced independent accountants testified they had ever seen, encompassing over 400 hours of the agent's time as well as hundreds of hours of time of others in his office. The assignment was given to Revenue Agent Melvin Radman by his supervisor, Paul Berwick, a former Intelligence Division agent (who since his transfer to the Civil Division had cooperated with Intelligence Division agents in several investigations), and an Intelligence Division Special Agent, Anders Flodin, who gave Berwick petitioner's first audit file and documents relating to the K&B-Hoffman Estates alleged bribery matter. A prior audit of the 1970 partnership return of the law firm of Deutsch & Peskin and the individual returns of the partners had already been completed by another Revenue agent (Richard Hein), and the law firm's accountant had already agreed to minor adjustments and signed a document listing them a few months earlier.

(2) When Revenue Agent Radman approached petitioner and his accountant about re-opening the audit (which Radman admitted he did not have proper statutory authority to reopen under 26 U.S.C. § 7605B), he asked why it was being re-opened. Although Mr. Radman had been specifically told by his supervisor, and by the Intelligence Division agent who gave him the assignment,

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* The facts are set forth only briefly here, but are stated in detail in Appendix 5 to this brief.

to look into the K&B-Hoffman Estates matter, and had been given checks and invoices relating to the alleged bribery transaction in Hoffman Estates, he did not mention this to petitioner or his accountant. Rather, Mr. Radman told the law firm's accountant only that the partners' capital accounts were in negative figures, which could represent a taxable event to each partner. Nothing more was ever said about this alleged reason for re-opening the audit, and no adjustments were proposed relating to this supposed issue.

(3) On the basis of the misrepresentation by Agent Radman as to his purpose in re-opening the audit, petitioner's accountant obtained the necessary consents to extend the statute of limitations, and petitioner furnished his full cooperation to Mr. Radman in his investigation.

(4) From time to time during Radman's work on petitioner's tax returns, Radman advised Flodin about the results of his investigation.

(5) Although petitioner was under criminal investigation before Radman's audit began, and throughout the entire period of the re-audit (extending more than six months), petitioner was never told that he was the subject of a criminal investigation by the IRS Intelligence Division, by the United States Attorneys' office, or by the grand jury, and he was not given *Miranda* warnings or told that he did not have to answer any questions asked by the agent conducting the re-audit of his partnership tax return.

At the hearing on the motion to suppress, petitioner contended that the re-audit conducted by Revenue Agent Radman was a subterfuge, which was not being conducted for the reason stated by Radman; rather, that the real purpose of the IRS was to obtain information for use in

the criminal investigations then being conducted of petitioner; that even if Revenue Agent Radman was not specifically aware of or "in on" the subterfuge, he was chargeable with the knowledge of the activities of the Intelligence Division, at whose behest he was conducting the re-audit; that petitioner was entitled to *Miranda* warnings under *United States* v. *Dickerson,* 413 F.2d 1111 (7th Cir. 1969); and alternatively that he was entitled to relief because the IRS Intelligence Division had not followed its own announced policy of informing taxpayers when they are under criminal investigation.*

The trial court rejected petitioner's arguments, concluding that at the time of Mr. Radman's re-audit, the government investigation by both the United States Attorney's office and the Intelligence Division had not focused on petitioner to the point where *Miranda* warnings were required under the holding of the Seventh Circuit in the *Dickerson* case. The Court of Appeals agreed with the government that IRS did not intentionally avoid compliance with *Dickerson,* and held that "The evidence does not support the contention that Radman's civil audit was a subterfuge . . ." (App. 17-18.)**

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* See *United States* v. *Sourapas,* 515 F.2d 295, 298, 300, (9th Cir. 1975); *United States* v. *Leahey,* 434 F.2d 7, 10-11 (1st Cir. 1970); *United States* v. *Heffner,* 420 F.2d 809, 811-12 (4th Cir. 1969).

** Since the trial court held that the evidence did not require suppression, the court below did not deal with the question of what evidence should be suppressed. Petitioner requested that the Court of Appeals reverse on all counts because, for practical purposes, it would be impossible to sort out the evidence introduced during the three-week trial to determine what information may have resulted from the detailed six-month audit conducted by Radman. Alternatively, petitioner requested that the Court of Appeals reverse the ruling on the motion to suppress and remand for a hearing on what evidence should be suppressed.

We submit that the Court of Appeals erred in reaching this conclusion, and that petitioner's constitutional rights were violated by admission of the evidence obtained by Mr. Radman. There is no dispute that an intense criminal investigation of petitioner was in progress at the time Radman came to petitioner's office. The so-called "civil re-audit" was a deliberate, planned subterfuge, structured by the IRS in order to obtain information for use in the criminal investigation without alerting petitioner. The undisputed facts give the lie to any innocent explanation of the IRS conduct. Mr. Radman may have been the unknowing handmaiden of Berwick and Flodin, but he was deliberately used by them to gather evidence from petitioner for the criminal investigation, so that Radman's lack of participation in the scheme cannot be relied on by the government to avoid the consequences of its trickery and deceit.*

The reason for the subterfuge is not difficult to determine. In 1969, three years before Flodin and Berwick assigned Radman to the "civil re-audit," the Seventh Circuit Court of Appeals had ruled in *United States* v. *Dickerson,* 413 F.2d 1111 (7th Cir. 1969), that ". . . Internal Revenue agents must give *Miranda* warnings at the inception of the first contact with the taxpayer after the case has been transferred to the Service's Intelligence Division." (App. 13-14.)** Berwick and Flodin knew that

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* *See Santobello* v. *New York,* 404 U.S. 257, 262 (1971); *United States* v. *Ott,* 489 F.2d 872, 873-74 (7th Cir. 1973).

** The Court of Appeals changed the *Dickerson* rule in the case at bar so that the event which triggers the need for warnings is ". . . the formal opening of the Intelligence Division criminal case." Compare *United States* v. *Beckwith,* Docket No. 74-1243, opinion below 510 F.2d 741 (D.C. Cir. 1975), in which a similar issue is presented to this Court.

if Special Agents went to petitioner's office and gave the warnings, petitioner would undoubtedly refuse cooperation. The alternative they selected—assigning a Revenue Agent to check petitioner's records and talk to him under the guise of civil re-audit—successfully lulled petitioner into cooperating. But this surely was chicanery of the sort that government should avoid even in its attempts to ferret out crime. Mr. Justice Brandeis' famous admonition is relevant here (*Olmstead* v. *United States*, 277 U.S. 438, 485 (1928)):

> ". . . To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that this Court grant a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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APPENDIX

APPENDIX 1

ARGUED JANUARY 13, 1975 — DECIDED DECEMBER, 10, 1975

Before CLARK, *Associate Justice,** FAIRCHILD, *Chief Judge,* and SPRECHER, Circuit Judge.

FAIRCHILD, *Chief Judge.* Appellant Peskin was indicted on 14 counts of a 23 count indictment charging conspiracy to violate the Travel Act 18 U.S.C. §371, substantive violations of the Travel Act, 18 U.S.C. §1952, and tax fraud, 26 U.S.C. §§7201, 7206(1). The indictment alleged that Peskin, representing Kaufman & Broad, Inc. (K & B) (a home builder of national stature headquartered in California) had passed money to public officials of the Village of Hoffman Estates, Illinois in return for approval of a K & B zoning proposal. Peskin's coindictees, K & B, the former Mayor of Hoffman Estates (Roy Jenkins), and five other village officials (James Sloan, Howard Noble, Gerard Meyer, Herbert Gibson and Edward Pinger), pleaded guilty. Peskin was convicted by a jury on the conspiracy count, five substantive Travel Act counts, and one count of making a false statement on an income tax return.

On appeal Peskin contests the sufficiency of the evidence to establish the federal jurisdictional elements of the Travel Act, the denial of suppression of evidence, certain evidentiary rulings, and other alleged errors. For the reasons that follow, we affirm his conviction on all counts.

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* Associate Justice Tom C. Clark (Retired) of the Supreme Court of the United States is sitting by designation.

I. THE PAYOFF

Peskin, an attorney, handled various real estate matters for K & B. In November, 1967 Peskin advised Edward Stulberg, a K & B vice-president, that Rossmoor Corporation was about to sell a large tract of real estate in Hoffman Estates, Illinois. With a view toward residential development, K & B negotiated and agreed to purchase two parcels, one of 320 acres and the other of 90 acres. The sale was contingent on K & B obtaining satisfactory rezoning of the property.

Over the summer of 1968, the Village Zoning Board of Appeals held hearings on the proposed K & B rezoning, ultimately recommending approval of the plan to the Board of Trustees.[1] The evidence indicates that during this period Peskin approached Mayor Jenkins offering money to obtain approval of the rezoning. The evidence also shows that several village officials demanded $25,000 in return for approval of the K & B proposal. By late September K & B was prepared to pay at least $100,000 for zoning approval.

On October 10, 1968, the Board of Trustees adopted the Board of Appeals' recommendation to approve the K & B plan, but at a meeting the following week the Board voted against the ordinance effecting the change, giving a basis for an inference that the village officials were squeezing K & B for more money. Before the next

[1] In 1968 zoning changes in Hoffman Estates were first presented to the Zoning Board of Appeals. After reviewing the proposals, this body would recommend an appropriate disposition to the Village Board of Trustees, whose chairman was the Mayor. The Board of Trustees would then accept or reject the proposals. If accepted, an ordinance embodying the change would be adopted by the trustees.

Board meeting Jenkins and Peskin met with those trustees who had opposed the ordinance to persuade them to change their votes. At a Board meeting October 24, at which Peskin and Stulberg were present, the Board voted to reconsider, and the matter was placed on the agenda for October 30.

Sometime in October, agreement was reached on the amount of the payoff and manner of payment: K & B would pay through Peskin $35,000 in cash to be distributed among Jenkins, Noble, Sloan, Meyer, Gibson and Pinger at the time the rezoning was accomplished. An additional $35,000 would later be paid to these officials as occupancy permits were issued as construction of the housing development progressed. There was also talk of a transfer of a gasoline station site in the new development as part of the payoff.

Since the K & B payment was to appear to be a fee for Peskin's services, it would be necessary to increase the payment from K & B to Peskin sufficiently to cover Peskin's liability for income tax thereon.

With a mutually acceptable price established, approval of the ordinance followed. At the October 30 meeting, Peskin, with Stulberg in attendance, presented the K & B position. In response, the local school board and several residents expressed opposition to the rezoning fearing that the increase in population resulting from the proposed development would overcrowd the schools. Nevertheless, the proposed ordinance rezoning the 320 acre parcel was approved. On November 14, the Board adopted the ordinance rezoning the 90 acre parcel.

Sometime between October 30 and November 30, Peskin paid Jenkins $35,000 in cash. Jenkins in turn distributed $5,000 to each of the other officials. Since the officials

either declined to run for reelection or were defeated in elections the following April, the $35,000 balance was never paid. The transfer of the filling station site was never accomplished, though included in a Deutsch and Peskin bill to K & B as part of attorney fees (Jan. 27, 1969), and mentioned by Peskin to a K & B official in 1971.

Payment to Peskin was made by an Illinois subsidiary of K & B, as follows:

Nov. 14, 1968	$10,000.
Jan. 14, 1969	$25,000.
Feb. 25, 1969	$10,000.
April 10, 1969	$55,000.

On December 24, 1968, Peskin's partner Deutsch wrote two checks for $20,000 each to two young lawyers, ostensibly as fees. The payees cashed the checks, kept part for taxes, and returned the balance. Deutsch testified he did this in order to obtain $25,000 in cash for Peskin, who said he needed it for the village officials.

II. THE TRAVEL ACT

A. *Count* 5

Count 5 of the indictment charged that Peskin and the other original defendants caused Stulberg to travel from Detroit to Chicago on or about October 22, 1968 with intent to promote the unlawful activity of bribery and thereafter they performed acts to promote the carrying on of that unlawful activity in Illinois. Peskin asserts that since Stulberg came to Chicago for reasons in addition to his interest in the Hoffman Estates zoning, his travel was incidental to the bribery. However, section 1952 does not require that a defendant's travel be solely in pursuit of criminal activity, *United States* v. *Gooding,* 473 F.2d 425,

428 (5th Cir. 1973), *cert. denied,* 412 U.S. 928, and since Stulberg traveled to participate in the rezoning scheme, it cannot seriously be contended that his travel was incidental. Stulberg attended the meeting of the village Board October 24, at which the trustees appeared to change their direction to a favorable one. This meeting, and Stulberg's presence, could well be deemed very significant in bringing about the unlawful activity of bribery.

Peskin further argues that Count 5 is defective because Stulberg's travel cannot be attributed to him and there is no proof that he caused the travel. Unlike *Rewis* v. *United States,* 401 U.S. 808 (1971), the interstate travel at issue here was the travel of an essential, knowing and deliberate participant in the crime. It is well established that co-conspirators are responsible for the acts of their cohorts in furtherance of the crime. *United States* v. *Joyce,* 499 F.2d 9, 16 (7th Cir. 1974), *cert. denied,* 43 U.S.L.W. 3306. Therefore, even apart from the probability that Peskin requested Stulberg's presence in Chicago in order to attend the meeting, Peskin is liable for Stulberg's travel because it furthered their common purpose. *United States* v. *Chambers,* 382 F.2d 910, 913-14 (6th Cir. 1967). *See United States* v. *Lee,* 448 F.2d 604, 607 (7th Cir. 1971), *cert. denied,* 404 U.S. 858.

As an adjunct to his causation argument, Peskin contends that even though the indictment is couched in causal language, the failure to cite 18 U.S.C. §2(b) precludes Peskin's conviction under section 1952 for what is essentially an aiding and abetting charge. This argument is clearly without merit, the indictment informed defendant of the offense charged. It alleged that he, and others, wilfully did cause Stulberg to travel. There was nothing misleading about the charge. Omission of a statutory

citation is not fatal "if the error or omission did not mislead the defendant to his prejudice." Rule 7(c)(3), Fed. R. Crim. P.

There is no question but that Peskin acted to promote the intended bribery after the Stulberg travel.

B. *Counts 6-9*

Counts 6, 7, 8 and 9 charged defendants with using and causing to be used facilities in interstate commerce with intent to promote the unlawful activity of bribery. The facilities were alleged to be various banks and the carrier system between Chicago and Detroit. In each count it was alleged that a check drawn upon a K & B account in a Detroit bank and payable to a K & B Chicago subsidiary was deposited in its account in Chicago; and that the check was transmitted from bank to bank until it reached the drawee bank in Detroit and charged to the K & B account. In each count it was charged that Peskin and others thereafter performed acts to promote the carrying on of the unlawful activity of bribery in Illinois.

The proof showed, as before stated, that Peskin was paid $100,000 by checks of the subsidiaries on four dates. These were in payment of billings by Peskin directed to Stulberg for attorney fees. In fact, the total sum was to cover the $35,000 Peskin paid the village officials, Peskin's income tax liabilities on the sum transferred, and his fee for services. On the day or the day after each of these checks to Peskin was drawn, one of the checks in these four counts was drawn and deposited. There was evidence that without such deposits, there were insufficient funds in the subsidiary's account to cover the checks drawn to Peskin. Thus it is clear that these K & B checks, and their interstate transmission in the process of clearing, were

essential in transferring to Peskin the funds necessary to carry out the arrangements between Stulberg and himself. There is no evidence that Peskin was specifically aware of these checks. He contends on appeal that the use of interstate commerce facilities was minimal and incidental and therefore insufficient under the Travel Act, and, additionally, that the violation of state law was completed before such use.

We first treat the argument that the use of interstate facilities was minimal and incidental.

Although the Travel Act, 18 U.S.C. §1952,[2] was enacted to combat organized crime, *United States* v. *Nardello,* 393 U.S. 286, 290-91 (1969), its language and scope are not so limited. *United States* v. *Archer,* 486 F.2d 670, 678-80 (2d Cir. 1973); *United States* v. *Phillips,* 433 F.2d 1364,

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[2] 18 U.S.C. §1952 provides in pertinent part:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in the subparagraph (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

1367 (8th Cir. 1970), *cert. denied,* 401 U.S. 917; *United States* v. *Roselli,* 432 F.2d 879, 885 (9th Cir. 1970), *cert. denied,* 401 U.S. 924. Nevertheless, we are mindful that Congress did not intend "a broadranging interpretation of §1952." *Rewis* v. *United States,* 401 U.S. 808, 812 (1971).

Peskin argues that he neither knew of nor solicited the interstate transfer and that the source of the funds was immaterial to him as well as to the bribery. Citing *United States* v. *Isaacs,* 493 F.2d 1124 (7th Cir. 1974), *cert. denied,* 417 U.S. 976; *United States* v. *Altobella,* 442 F.2d 310 (7th Cir. 1971); and *United States* v. *McCormick,* 442 F.2d 316 (7th Cir. 1971), he concludes that the use of interstate facilities to clear the Detroit checks was "minimal" and "incidental" and thus insufficient to invoke the Travel Act.

The transmission of funds to Mr. Peskin was essential to the carrying on of the illegal activity. Although he had advanced the first payments, others were contemplated, and no one would expect him to complete the plans if he were not reimbursed in the first instance. The deposit and interstate clearance of the Detroit checks were essential in fact to the payment of Peskin, though he and perhaps Stulberg were unaware of the details. We do not consider this use of interstate facilities "minimal" and "incidental" as those terms have been used in this context.

The significance of the use of interstate facilities in this case differs markedly from that in the cases relied upon. *Altobella* held that the clearance of an out-of-state check used by the victim of an extortion to raise cash with which to make payment even though followed by the distribution of the proceeds among the wrongdoers was minimal and insufficient to invoke federal jurisdiction. In *McCormick* an operator of a purely local gambling activity advertised for salesmen. A few of the newspapers containing the advertisements were mailed to out-of-state subscribers.

This court held "there was no showing that defendant's lottery in any way depended upon or included interstate operations." *McCormick, supra,* 442 F.2d at 318. In *Isaacs,* three checks were drawn in Illinois on an Illinois bank, to distribute the proceeds of unlawful activity. They were deposited in Illinois banks, but cleared through the Federal Reserve Bank in St. Louis. Noting that checks which would have cleared through Chicago could just as easily have been utilized, the court held that the use of interstate facilities which in fact occurred "was so minimal, incidental, and fortuitous, and so peripheral to the activities" of defendants, that it was error to submit the counts to the jury. *Isaacs, supra,* 493 F.2d at 1146. *Rewis* v. *United States,* 401 U.S. 808 (1971) was a case where customers crossed a state line to patronize an otherwise local unlawful gambling activity of defendants. The Supreme Court held that, at least in the absence of a finding that defendants "actively sought interstate patronage," the interstate travel of the customers did not provide grounds for prosecution of defendants under the Travel Act.

Here, as already noted, the clearance of the Detroit checks was necessary in fact to complete reimbursement of Peskin for the bribe money he had advanced, and such reimbursement furthered the contemplated later illegal activity.

That Peskin was not specifically aware of the interstate transfer is unimportant. The use of interstate facilities provides the basis for federal jurisdiction. The statute does not expressely provide that the defendant must knowingly use interstate facilities. *United States* v. *LeFaivre,* 507 F.2d 1288, 1297 (4th Cir. 1974), *cert. denied,* 420 U.S. 1004; *United States* v. *Hanon,* 428 F.2d 101, 108 (8th Cir.

1970) (en banc), *cert. denied,* 402 U.S. 952; *United States* v. *Bash,* 258 F.Supp. 807 (N.D. Ind. 1966), *aff'd, sub. nom. United States* v. *Miller,* 379 F.2d 483 (7th Cir. 1967).

Considering the Act's purpose, it is plain that such a scienter requirement should not be implied. The statute was intended to assist local authorities in combating criminal activities that extend beyond the borders of one state. *United States* v. *Nardello,* 393 U.S. 286, 290-92 (1969). This purpose would be severely undermined if the statute were read to require that each participant, in order to be found guilty, must be proved to know in fact that interstate facilities were used.

Finally, the interstate scope of the unlawful activity is clear, and was known to Peskin. K & B carried on activities in several states. Peskin dealt with Stulberg in Detroit as well as in Chicago.

We next consider, as to each count, whether there was a so-called "thereafter act" with respect to the use of interstate facilities charged in each count.

In *United States* v. *Zemater,* 501 F.2d 540, 544 (7th Cir. 1974) we observed that to have violated the Travel Act a person

> . . . must have 'used a facility in interstate commerce to facilitate the carrying on' of an illegal enterprise as defined by the statute 'and *thereafter* performed the carrying on' of the unlawful activity. (Emphasis in original.)

Peskin contends that since the village officials were paid the $35,000, apparently by cash advanced by Peskin, before the Detroit checks were issued in the process of reimbursing him, he performed no acts thereafter to promote the carrying on of the unlawful activity of bribery in Illinois.

The evidence does not make clear the date on which Peskin delivered the $35,000 cash to Jenkins. Such payment occurred either within two weeks before or after the use of interstate facilities charged in Count 6. It is clear that it occurred before the use of interstate facilities charged in Counts 7, 8 and 9.

Defendant's contention must be based on the view that the unlawful activity of bribery involved in the case terminated with the payment to Jenkins in November and distribution by him to the other recipients. This view overlooks the fact that after such payment there remained outstanding the promise of an additional $35,000 to be later paid, and of a transfer of real estate to Jenkins. Although neither of the latter was consummated, they were intended by the parties and would also have constituted unlawful activity. Until those intentions were abandoned, acts to promote or carry them on, or to facilitate their promotion or carrying on would be acts fulfilling the terms of the Travel Act.

Under this latter analysis, Peskin's acts in collecting reimbursement for the first-round payment would constitute acts to promote, carry on, facilitate or the like, since he could scarcely be expected to advance the second-round payment if not reimbursed for the first. In addition, Peskin had Deutsch arrange to generate $25,000 in cash which Peskin said was for the village officials. He may simply have been replenishing his supply of cash out of which he had advanced the first payment. Even so, such replenishment would be preparation for the agreed later payments. This transaction occurred after the use of interstate facilities charged in Count 6, and would be a "thereafter act" supporting that count.

Finally, there was evidence that in May, 1971, Peskin asked K & B to transfer the real estate promised to

Jenkins. The jury could properly have viewed this request as an attempt to promote and carry on that part of the contemplated unlawful activity. So viewed, it would support conviction on counts 6, 7, 8 and 9 since the May, 1971 request occurred after all the uses of interstate facilities set forth in those counts.

Accordingly we sustain the convictions and sentences on counts 6, 7, 8 and 9, as well as 5.

We think, moreover, that even without the fact that further bribery was contemplated, the acts of Peskin in billing and accepting successive payments constituted acts facilitating the carrying on of the unlawful activity even though they occurred after the zoning had been changed and the bribe had been paid. The promise to reimburse Peskin was a necessary step in effecting the bribery. We do not think it strained to say that, even though reimbursement occurred after the bribe was received by the officials, it was part of the unlawful activity for the purpose of the Travel Act. See *United States* v. *Corallo,* 413 F.2d 1306, 1320 (2d Cir. 1969).[3] On this analysis counts 6, 7, and 8 would be sustained and only the conviction on Count 9 would be vacated, since defendant was shown to have accepted reimbursement after each use of the interstate facilities other than the use charged in Count 9.

[3] Section 1952 refers to state law only to identify the unlawful activity in which the defendant is engaged. *United States* v. *Rizzo,* 418 F.2d 71, 74 (7th Cir. 1969), *cert. denied,* 397 U.S. 967. The federal crime is the use of the interstate facilities in furtherance of the unlawful activity, not the violation of state law. *United States* v. *Karigiannis,* 430 F.2d 148, 150 (7th Cir. 1970), *cert. denied,* 400 U.S. 904. There is therefore no requirement that the state crime ever be completed. *McIntosh* v. *United States,* 385 F.2d 274, 276 (8th Cir. 1967).

III. THE SUPPRESSION MOTION

Prior to trial, Peskin moved to dismiss the indictment or, in the alternative, to suppress any statement made by him, evidence obtained from his accountants and evidence derived from these sources.[4] The theory of the motion was that from September 1972 on, Peskin was the subject of a criminal investigation; that this investigation was carried on under the guise of two civil income tax audits; and that the failure of Internal Revenue agents to inform him of his rights under *Miranda* v. *Arizona,* 384 U.S. 436 (1966) in the course of these audits violated his constitutional rights. After a lengthy hearing, the district court denied the motion.

Peskin relies on *United States* v. *Dickerson,* 413 F.2d 1111 (7th Cir. 1969), asserting that a taxpayer is entitled to *Miranda* warnings at his first meeting with Internal Revenue agents after he has become a criminal suspect, regardless of whether a formal criminal file has been opened. *Dickerson,* however, does not stand for such a sweeping proposition. That case only established the rule in this circuit that Internal Revenue agents must give *Miranda* warnings at the inception of the first contact

[4] Much of the information examined by Mr. Radman was not protected by the Fifth Amendment rights of Mr. Peskin. Radman's audits were primarily directed at partnership returns and records. Mr. Peskin's general assertion that he cooperated and answered questions suggests a possibility that Radman may have obtained information suppressible if *United States* v. *Dickerson,* 413 F.2d 1111 (7th Cir. 1969) applied, but the existence or extent of that information or of any information ultimately obtained as a result was never explored because of the court's ruling now challenged.

with the taxpayer after the case has been transferred to the Service's Intelligence Division.[5]

Alternatively, Peskin contends that the warnings should have been given because the government intentionally delayed referral of the case to the Intelligence Division to avoid the *Dickerson* holding. This issue was reserved in *Dickerson's* companion case, *United States* v. *Habig,* 413 F.2d 1108, 1111 n.4 (7th Cir. 1969), *cert. denied,* 396 U.S. 1014. Whether we must now reach it requires examination of the events leading up to the formal opening of the Intelligence Division tax case against Peskin.

The initial IRS contact with Peskin occurred during the summer of 1972. Revenue Agent Richard Hein was assigned to audit the 1970 partnership tax return of the law firm Deutsch, Peskin and Levy. Hein was neither told to look for nor did he discover any criminal activity.

At about that time, Assistant United States Attorney Anton Valukas was involved in a Grand Jury probe of the United States Department of Housing and Urban Development and K & B. During the probe Valukas heard allegations concerning Peskin and bribery in Hoffman Estates. He wrote the regional IRS director requesting the tax returns of Earl Deutsch, Paul Levy and Peskin for the years 1968, 1969, 1970, and 1971. In August and September the Grand Jury subpoenaed K & B to present

[5] In many cases, as in the case before us, Special Agents of the Intelligence Division may examine leads or discuss matters with their civil counterparts. In this context, referring to what *Dickerson* found to be the crucial step as "the transfer of the case to the Intelligence Division" may be somewhat misleading. It is perhaps more accurate to refer to the critical event as the formal opening of the Intelligence Division criminal case.

checks written to Peskin or the law firm and other documents relating to K & B Transactions in Hoffman Estates, Palatine, and Matteson, Illinois.

In October, Valukas happened to have lunch with Special Agent Anders Flodin of the IRS Intelligence Division and several others. Flodin was involved in an investigation of the Cook County Assessor's Office and recognized Deutsch's name when Deutsch and Peskin were mentioned in conversation. In passing, Valukas mentioned that he had heard that Peskin had received a $100,000 fee for the K & B Hoffman Estates rezoning and that Peskin had been conveyed a gasoline station site for transfer to the village mayor. Since Flodin was interested in Deutsch, Valukas sent Flodin canceled checks from K & B Homes, Inc. payable to Deutsch & Peskin and the billing statements for the $100,000 fee.[6]

Shortly thereafter, Flodin evaluated the information available to him and decided that it had "no intelligence division potential." Believing that there might be a need for a civil tax adjustment, he turned the material over to Paul Berwick, Group Manager, Audit Division, and

[6] During the fall of 1972, Valukas had a conversation with Special Agent Paul Neuhauser, a Group Manager in the Intelligence Division, in which Valukas mentioned the $100,000 payment to Deutsch & Peskin and that he had requested the IRS to disclose the relevant tax returns. Anticipating that disclosure would be granted, Neuhauser gathered the returns for the partnership and the partners for the years 1968-1972. After scanning the returns and seeing nothing unusual, Neuhauser asked Valukas if he could see the checks and K & B invoices. Valukas told him they were in Flodin's possession. Neuhauser then saw Flodin and examined the checks. Flodin told Neuhauser he was going to refer the information to Audit Division, and Neuhauser dropped the matter.

gave him some background information on Deutsch. Berwick assigned Revenue Agent Melvin Radman to audit the 1969, 1970, and 1971 returns of the Deutsch & Peskin partnership and the returns of the individual partners. Berwick's primary concern was that if the partnership received the gasoline station site, the real estate might have been inaccurately valued for tax purposes.

In January 1973, Agent Radman commenced the audit. He explained to the firm's accountant that the reaudit of the 1970 return was necessary to examine the firm's capital accounts.[7] Radman worked on the audit intermittently over the first six months of the year, but nevertheless spent considerable time on the project. He had no contact with the U.S. Attorney's office concerning the audit, but he had several meetings with Flodin (apparently by chance) during which the Deutsch & Peskin audit was mentioned.

On April 3, Special Agent James Swanson of the Intelligence Division was in Assistant U.S. Attorney Valukas' office on an unrelated matter. Valukas received an anonymous telephone call, and Swanson took the phone. The caller implicated K & B, the Deutsch & Peskin firm, and the Hoffman Estates officials in a zoning bribery scheme.

[7] By so representing the purpose of the audit, Peskin contends, Radman intentionally misled the taxpayer and obtained evidence by fraud and deceit. We recognize that "appellate court cases dealing with fraud in tax situations warn that revenue agents must not affirmatively mislead a taxpayer into believing that the investigation is exclusively civil in nature and will not lead to criminal consequences. . . ." *United States* v. *Lehman*, 468 F.2d 93, 105 (7th Cir. 1972), *cert. denied*, 409 U.S. 967. Peskin's contention, however, is unpersuasive, since the evidence does not support the view that Radman was conducting something other than a civil audit.

Valukas indicated that this information corroborated other allegations he had heard. Swanson informed his supervisor, Group Manager Neuhauser, and set out to confirm the charges. He first investigated the village officials, and cases were formally opened against them in June.

In late May or early June, Swanson became aware of the Radman audit. He visited Radman and received the Hoffman Estates-K & B rezoning file that Flodin had given Berwick. This was the first time Radman had met Swanson. In late June, Swanson was informed that Stulberg was about to make a statement implicating Peskin and immediately advised Berwick to discontinue contact with Peskin until Stulberg's story was verified. Berwick notified Radman.

In September Earl Deutsch was granted immunity and agreed to testify concerning the firm checks to attorneys ostensibly in payment for services, but actually to generate cash for Peskin. At this point Agent Swanson indicated there was probable cause to believe that Peskin violated the tax laws, and the Intelligence Division formally opened the case. When Swanson confronted Peskin on October 1, 1973, he gave Peskin the *Miranda* warnings.

Whatever may be the rule when the IRS purposefully delays referral of a tax case to the Intelligence Division, the evidence does not support a finding that the government intentionally avoided compliance with *Dickerson* in this case. See *United States* v. *Esser*, 520 F.2d 213, 216 (7th Cir. 1975). In the first place, through the first six months of 1973, any thought of possible prosecution had not sufficiently focused on Peskin to necessitate the giving of *Miranda* warnings under the rationale of *Dickerson*.

Flodin's interest was Deutsch, not Peskin, and Berwick's interest was in a civil audit of the returns. The fact that Flodin discarded the Deutsch-Peskin file as being without intelligence potential runs counter to any notion that "the investigative machinery of the government [was] directed toward the ultimate conviction of a particular individual and [the] suspect should [have been] advised of his rights." *United States* v. *Dickerson, supra,* 413 F.2d at 1115, *citing United States* v. *Turzynski,* 268 F.Supp. 847, 852 (N.D. Ill. 1967). See *United States* v. *McCorkle,* 511 F.2d 482, 487-89 (7th Cir. 1975) (en banc).

After the April 3 telephone call in Valukas' office, Swanson set out to corroborate the charges of bribery in Hoffman Estates, first investigating the trustees, then turning to Deutsch & Peskin. When Stulberg's statement further implicated Peskin, Radman was told to terminate contact with the taxpayer. It was not until Deutsch's September statement revealing the spurious attorney fee payments that there was a firm basis for a tax fraud case.

The evidence does not support the contention that Radman's civil audit was a subterfuge in a criminal investigation conducted by either the Intelligence Division or the U. S. Attorney's Office. Radman knew nothing of the U. S. Attorney's investigation, and Swanson was not aware of the civil audit until late May, 1973 at the earliest. In short, although defendant urges that there must be more than mere coincidence in the fact that the audit proceeded as it did after and during various expressions of interest in rumors of bribery by Mr. Peskin, the record fully supports the district court's observation, denying the motion to suppress:

> At the time of the Radman audit, the total government investigation, both the U.S. and the Intelligence Division, had not yet focused on Peskin to the extended [degree] required to demand the *Miranda* warnings, under the rules, and even the more rigid rules set down in the Dickerson case. I think I must take note from the evidence I heard that the background of this case reveals a rather intensive investigative activity of several areas of suspected wrongdoing, and that the evidence ultimately utilized to obtain the indictment against Mr. Peskin could almost be characterized as an accidental by-product of other investigations. And it does seem that in the course of the other investigations, as random facts came to the attention of the U. S. Attorney, or the Intelligence Division, and as information was exchanged, that they more or less, put these random pieces of information on the shelf, and that is certainly the basis for suspicion. But they were probably not, or at least did not in the minds of the government seem to be the basis for a conclusion that they had criminal activity on the part of an individual defendant such as to justify an intensified investigation. When that conclusion was reached, and the case was referred as a fraud case, it was done at a date subsequent to the Radman investigation and the information that he had obtained.

IV. EXTORTION DEFENSE

Several claims of error relate to the so-called extortion defense. Actually the defense so referred to was an effort to raise a reasonable doubt as to Mr. Peskin's intent to influence official conduct.

Under the Travel Act the relevant definition of bribery for this case is Ill. Rev. Stat., Ch. 38 §33-1(c), providing that one commits bribery when

> with intent to cause any person to influence the performance of any act related to the employment or function of any public officer, public employee or juror, he promises or tenders to that person any property or personal advantage which he is not authorized by law to accept. . . .

Defendant apparently hoped to prove that the merits of the K & B plan were so compelling that K & B had a virtual right to the change in zoning it sought; that the village officials uniformly exacted money for zoning changes; and that their demand of money of K & B for the change it sought constituted extortion such that compliance with the demand either could not be bribery as a matter of law, or at least a jury might entertain a reasonable doubt of the intent essential to bribery.

Defendant complains of limitations imposed by the district court on his proof of the merits of the plan and the past pattern of demands of the village officials for money, and of an instruction limiting the defense of extortion to one that is so overpowering as to negate criminal intent or wilfulness.

A. Merits of the K & B Proposal

Defendant offered proof that the K & B project compared favorably to similar developments approved by the village. The comparisons were made with respect to density per acre, school children per acre, and tax base per child. These related to some of the bases for opposition to the project made evident at the zoning board and trustees' meetings.

A trial judge has discretion to keep a trial within reasonable bounds by excluding evidence of marginal relevance, *United States* v. *Conrad*, 448 F.2d 271, 274-75 (9th Cir. 1971). The testimony as to statements at the meetings

showed favorable expressions as well as opposition. Counsel was able to elicit favorable figures during cross-examination of Stulberg. A zoning change is a decision of a discretionary or legislative type, and the evidence in the record made it very improbable that further evidence would have conclusively shown that the plan was in the community's best interests as of the date of the zoning hearings. Without intimating any conclusion that the evidence would be relevant if it could have so shown, we do conclude that in any event there was no abuse of discretion in excluding additional evidence on the plan's merits. *United States* v. *Gorman*, 393 F.2d 209, 212 (7th Cir. 1968), *cert. denied*, 393 U.S. 832.

B. Prior Similar Payments Received by Hoffman Estates Officials

The district court permitted defendant to ask each village official who testified whether he had "ever received money which came from other builders for [his] vote on zoning matters." Each one said he had.[8] We intimate no conclusion as to whether defendant was entitled to this question and answer.

The court rejected, however, an offer to prove by these and other witnesses that there had been a pervasive and systematic pattern of payments for zoning in Hoffman

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[8] Although the phrasing differed, this was the sense of the questions put to Meyer, Sloan, and Noble. Mayor Jenkins was asked whether he had ever received a bribe in his capacity as a village official. The government later stipulated that if Jenkins was asked a question similar to the questions posed to the trustees, he would respond, as they did, affirmatively.

Estates, the court noting, among other reasons, that there was no showing this pattern was known to Peskin.

Permission to the defense to proceed with the offer of proof would have prolonged the trial, and would have introduced the details of a substantial number of unrelated transactions. At best for defendant, the probative value of these payments in other instances is open to question. As the Second Circuit recently observed: "Almost every bribery case involves at least some coercion by the public official; the instances of honest men being corrupted by 'dirty money,' if not nonexistent, are at least exceedingly rare." *United States* v. *Kahn,* 472 F.2d 272, 278 (2d Cir. 1973), *cert. denied,* 411 U.S. 982. Accordingly, evidence that the officials previously, or on this occasion, demanded money carries little weight in a case such as this.

In view of these considerations and our review of the record, we conclude there was no abuse of discretion in the rejection of the offer of proof.

C. Instruction as to Extortion Defense

The district court instructed the jury on the relationship of an official demand for money and the intent required for conviction of bribery, as follows:

> If you find that the public officials named in the indictment communicated a threat to the defendant that unless paid they would take action as public officials against Kaufman and Broad's zoning proposal, you may consider this in determining whether the defendant intended to commit bribery.
>
> - - - - and further - - - -

> In determining whether the defendant was a victim of extortion, such as to negate his alleged criminal intent to bribe, it is relevant, but not controlling, whether Peskin or Jenkins first raised the question of money. *Unless the extortion is so overpowering as to negate the criminal intent of wilfullness, it is not a total defense to bribery charges.* (We have italicized the portion of the instruction particularly objected to.)

There appears to be no Illinois authority to support a proposition that any particular degree of pressure by an official demanding money in return for the performance of an official act is a defense to a charge of bribery in Illinois. This being true, it seems to us that at least in a case like the instant one where a discretionary or legislative decision on zoning has been requested, the withholding of such action until a money demand is met could not negate the intent (to influence the performance of an official act) required by the Illinois bribery statute. Thus the challenged portion of the instruction is not reversible error. Its language was taken almost verbatim from the observation of the court in *United States* v. *Kahn, supra,* 472 F.2d at 278.

V. EVIDENCE OF A SUBSEQUENT BRIBE

Prior to resting his case, Peskin's attorney requested a ruling on whether the government would be able to cross-examine Peskin, if he took the stand, about the alleged payment of money to a public official in return for favorable treatment of a K & B development two years after the Hoffman Estates transaction. The district court ruled that the evidence was relevant and that the government could inquire into the incident. Rather than risk exposure of this evidence, Peskin decided not to testify. He argues

that the district court's ruling was wrong as a matter of law and under the facts of this case denied him a fair trial.

Evidence of other crimes and misconduct is relevant if it bears upon intent, knowledge, or absence of mistake or accident. *United States* v. *Jones,* 438 F.2d 461, 465 (7th Cir. 1971); *United States* v. *Marine,* 413 F.2d 214, 216-17 (7th Cir. 1969), *cert. denied,* 396 U.S. 1001. See Fed. R. Evid. 404(b), Act of January 2, 1975, Pub. L. No. 93-595. Evidence of the subsequent payoff was admissible on that theory absent a showing of overriding prejudice or remoteness. *United States* v. *Barash,* 412 F.2d 26, 30-31 (2d Cir. 1969), *cert. denied,* 396 U.S. 832. We think that it was not an abuse of discretion to rule that this incident was a proper subject for cross examination. *Cf. United States* v. *Kahn, supra,* 472 F.2d at 282.

VI. HAYTER AND FAUBIAN TESTIMONY

Peskin also asserts that the testimony of Virginia Hayter and Royal Faubian was irrelevant and prejudicial. Hayter, as president of the local school board, attended the Trustees' meeting at which the K & B rezoning was debated and approved on October 30, 1968. Hayter testified to a conversation she had with Peskin during the meeting: he asked, "what will it take to make you happy?"; and when she turned away indignantly, he stated, "this is going through." This testimony can be taken to mean that Peskin was opening the subject of a payment to her for withdrawal of opposition and that he knew before the vote was taken that the rezoning's passage was a foregone conclusion. So construed, it was damaging, but that does not make it inadmissible. Though the remarks

were somewhat ambiguous, they were relevant evidence for the jury to weigh and consider.

Faubian, a former officer of K & B, testified concerning a meeting he had with Peskin in 1971. During the meeting Peskin cautioned Faubian that he may be shocked by what he was to hear but to keep it confidential. Peskin then related that considerable funds had been paid to officials of Hoffman Estates for favorable zoning and that the gasoline station site, which was apparently part of the deal, had not been transferred to the village mayor. We fail to see how it can be argued that this damaging admission is irrelevant and reject Peskin's claim on this point as meritless.

VII. MISCELLANEOUS

A. Coerced Verdict

After the jury had deliberated two and one-half days, the trial judge informed counsel that he intended to dismiss the jury if it had not reached a verdict by 10:00 P.M. At about 9:30 P.M. he indicated to counsel that he intended to ask the jurors if they had reached a verdict or, if they had not, whether they could within the next few minutes. The jury was then brought into court, and the following exchange occurred:

> THE COURT: . . . My first question is—and I gather that we all know the answer to this—have you yet reached a verdict as to all the counts in the indictment?
>
> FOREMAN BROWN: No.
>
> THE COURT: You have not. All right.

Do you think that if you were allowed to deliberate, let's say, another half hour—and I don't intend to keep you in there any longer than that—you might reach a verdict as to all of the counts in the indictment?

FOREMAN BROWN: Yes.

THE COURT: You believe that you are close to a verdict on the complete indictment then?

FOREMAN BROWN: Possibly.

THE COURT: Now let me ask all the members of the Jury, by a show of hands, to tell me, do you think it would be profitable and possible to reach a complete agreement on all counts of the indictment if you deliberated until 10:00 o'clock? How many would think it would be worthwhile to do that? Show of hands?

Well, we will do that then. If you will retire again, we will call you out again at 10:00 o'clock.

Peskin argues that the judge's statements were coercive, coercing the jurors to hurry their decision and denying him his right to a carefully considered verdict. Defense counsel did not object when the statements were made, and given a timely objection the judge could have readily cured any perceived prejudice. Therefore, unless the statements can be said to be "plain errors or defects affecting substantial rights," Peskin has waived his complaint. Fed.R.Crim.P. 52(b).

Communications between judge and jury must be handled with particular care, and statements suggesting that the jury reach a quick verdict at the expense of a thoughtful verdict are to be deplored. The jury here had twice been given general instructions on presumptions and burdens and told, in accordance with *United States* v. *Silvern*,

484 F.2d 879 (7th Cir. 1973) (en banc), that they should not surrender honest opinions as to the weight of the evidence "for the mere purpose of returning a verdict." The judge's statements, moreover, were ambiguous. He did not say that a verdict must be reached by 10:00. Although we know from his statement to counsel that he planned to discharge the jury if it failed to reach a verdict by 10:00, the jurors may have reasonably interpreted his statement that he would send them to their hotel rooms in preparation for another day's deliberations.

Failure of counsel to object, aside from its effect as waiver, is probably evidence that interpretation of the remarks as coercive would be a strained rather than a natural interpretation. Considering these factors as well as the length of the jury's deliberations, we do not believe that the judge's comments "could have persuaded a juror entertaining a conscientious conviction that the defendant's guilt had not been proved to surrender it as a matter of expediency." *Smith* v. *United States,* 188 F.2d 969, 972 (9th Cir. 1951); *Glazerman* v. *United States,* 421 F.2d 547, 554 (10th Cir. 1970), *cert. denied,* 398 U.S. 928.

B. SELECTIVE ENFORCEMENT

Relying on *United States* v. *Falk,* 479 F.2d 616 (7th Cir. 1973) (en banc), Peskin next argues that he was the victim of selective enforcement of the laws and that the district court erred in refusing to grant a hearing on this claim. Peskin, a former member of the Illinois General Assembly, charges that he was prosecuted because he was politically prominent and newsworthy; that others who participated in the bribery were not prosecuted; and that the usual practice of the United States Attorney's Office

was to prosecute the officials who received payoffs, not go-betweens like Peskin.

A selective prosecution defense invokes the equal protection component of the Fifth Amendment's due process clause. Fundamental to the defense is proof that the decision to prosecute was based on impermissible considerations such as race, religion, or the desire to penalize the exercise of constitutional rights. *United States* v. *Swanson,* 509 F.2d 1205, 1208 (8th Cir. 1975); *United States* v. *Berrios,* 501 F.2d 1207 (2d Cir. 1974). In *Falk* we held that a defendant is entitled to a hearing on this issue when he "alleges intentional purposeful discrimination and presents facts sufficient to raise a reasonable doubt about the prosecutor's purpose . . . ." 479 F.2d at 620-21. In the absence of such a showing the weighty presumption of the legality of the prosecution remains unshaken. Mere "conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." *Oyler* v. *Boles,* 368 U.S. 448, 456 (1962).

Unlike *Falk* where there were facts alleged which colorably showed that the prosecution was undertaken with the motive to suppress dissent against the war in Vietnam, Peskin has not alleged a *prima facie* entitlement to a hearing. Assuming that the decision to indict Peskin and press for trial was based in part on consideration of his political prominence, this is not an impermissible basis for selection. It makes good sense to prosecute those who will receive the media's attention. Publication of the proceedings may enhance the deterrent effect of the prosecution and maintain public faith in the precept that public officials are not above the law.

C. Tax Count Instruction

Peskin was charged in separate counts with income tax evasion and making a false statement on the 1968 partnership return. He was only convicted on the false statement count. In his reply brief he argues error in the following instruction:

> A defendant's knowledge of the contents of the tax return may be inferred from the facts and circumstances of the case, and the signature at the bottom of the tax return is prima facie evidence that the signer knew the contents thereof, which is to say, that unless and until outweighed by evidence in the case which leads you to a different or contrary conclusion, you may find from the defendant's signature at the bottom of his respective return that he had knowledge of the contents of that return.

This instruction was given on the element of willfulness on the tax evasion count. He was acquitted on this count, but willfulness is also an element of the false statement count.

The phrasing may be subject to criticism since it suggests that evidence must be introduced to outweigh the inference of knowledge permissible from the signature. The instructions on the false statement count, however, indicated that carelessness or inadvertence was a defense. Reasonable doubt instructions were also given. Taking the instructions as a whole we find no likelihood that the jury felt compelled to infer knowledge from the signature, and no reversible error. See also *United States* v. *Bass,* 425 F.2d 161, 163 (7th Cir. 1970); *United States* v. *Harper,* 458 F.2d 891, 894 (7th Cir. 1971), *cert. denied,* 406 U.S. 930.

D. Sentencing Disparity

Lastly, Peskin contends that the disparity between his sentence and the sentences received by those who pleaded guilty indicated that he was penalized for exercising his right to a jury trial. Peskin received three years in prison on each count, the sentences to run concurrently. Other participants in the bribery transaction received sentences ranging from six months to two years.

A sentence which reflects punishment for a defendant's availing himself of his right to trial will be set aside, *United States* v. *Wiley,* 278 F.2d 500 (7th Cir. 1960), but a disparity between a sentence imposed on a defendant who pleads guilty and on another who is convicted after trial is not, standing alone, enough to establish that the latter has been punished for exercising a constitutional right. *United States* v. *Wilson,* 506 F.2d 1252, 1259-60 (7th Cir. 1974).

The trial judge commented at the time of sentencing on factors which he felt spelled out greater culpability for Mr. Peskin than his codefendants. We have no reason to find an abuse of discretion.

The judgment appealed from is affirmed.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX 2

December 10, 1975

Before
Hon. Tom C. Clark, Associate Justice*
Hon. Thomas E. Fairchild, Chief Judge
Hon. Robert A. Sprecher, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 74-1450 vs.

BERNARD M. PESKIN,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 73 CR 765

Bernard M. Decker, Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, in accordance with the opinion of this Court filed this date.

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* Associate Justice Tom C. Clark (Retired) of the Supreme Court of the United States is sitting by designation.

APPENDIX 3

March 8, 1976.

Before
Hon. Tom C. Clark, Associate Justice*
Hon. Thomas E. Fairchild, Chief Judge
Hon. Robert A. Sprecher, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 74-1450 vs.

BERNARD M. PESKIN,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
(CV 4758)

On consideration of the petition for rehearing and suggestion that it be reheard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge having voted to grant the suggestion, and all of the members of the panel having voted to deny a rehearing,

It Is Ordered that the petition for a rehearing in the above-entitled cause be, and the same is hereby, Denied.

Note: Judge Philip W. Tone did not participate in the consideration of the suggestion of rehearing *en banc.*

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* Associate Justice Tom C. Clark of the Supreme Court of the United States (Retired) is sitting by designation.

APPENDIX 4

SUPREME COURT OF THE UNITED STATES

No. A-855

BERNARD M. PESKIN,
Petitioner

V.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing of petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 21, 1976.

/S/ *John Paul Stevens*
Associate Justice of the Supreme Court of the United States

Dated this 29th
day of March, 1976

APPENDIX 5

THE EVIDENCE ADDUCED ON THE MOTION TO SUPPRESS EVIDENCE

The hearing on the motion to suppress evidence was based on Peskin's pre-trial petition and supplemental petition which alleged in substance that he was audited by the Internal Revenue Service at a time when criminal investigations were being conducted of him and his law firm (Deutsch, Peskin & Levy) by the United States Attorney and the IRS Intelligence Division; that Peskin voluntarily supplied a great volume of information to Internal Revenue Agent Melvin Radman because he was unaware of the pending criminal investigation; that he was not warned by Radman that he was the target of investigations, nor otherwise admonished about his rights, contrary to *United States* v. *Dickerson*, 413 F.2d 1111 (7th Cir. 1969); and that he was affirmatively misled by Agent Radman into believing that only a civil audit was involved, whereas the real purpose of the audit was to obtain evidence for use against Peskin in the pending criminal investigations. (R. 90-91; 101.)

The First Audit By Agent Hein

In the summer of 1972, Internal Revenue Agent Richard Hein was assigned to audit the 1970 partnership return of the law firm of Deutsch, Peskin and Levy. Agent Hein was a trainee at that time, so he had an experienced agent supervising him who reviewed the audit when he finished it about September, 1972. Hein prepared a written report directing several minor adjustments on the law firm's business expenses. Hein discussed these adjustments with

the law firm's public accountant, Joseph Adelman, who agreed to the changes and signed the document listing them. (Hein, Tr. 6-12; Adelman, Tr. 439-40; DX 1.)*

The Investigation By The United States Attorney

On September 7, 1972, about the time Hein was concluding his audit, Assistant United States Attorney Anton R. Valukas sent a letter to the Director of the Internal Revenue Service Center in Kansas City asking him to send, as quickly as possible, any intelligence information gathered on Peskin. Valukas stated in the letter that Peskin was under investigation and that the Grand Jury was in the process of hearing testimony relating to the investigation. (Valukas, Tr. 418-19; DX 11.)

On August 23 and September 8, 1972, Valukas had grand jury subpoenas served on K&B in order to check on allegations concerning Peskin's involvement in bribery of public officials in Hoffman Estates. (Valukas, Tr. 645.) The subpoenas call for Deutsch & Peskin bills to K&B for services relating to Hoffman Estates zoning, letters from Peskin to K&B, and checks from K&B to Peskin in payment of the Hoffman Estates bills (DX 9-9D, 47-47C).

Meeting Of Valukas And Internal Revenue Service Special Agent And Subsequent Events

Sometime in September or early October, 1972, Valukas had lunch with Anders Flodin, a Special Agent in the In-

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* The transcript referred to in the sections relating to the Motion to Suppress is a separate set of six volumes. The Court Reporter numbered the pages of the transcript relating to the hearing on the Motion consecutively, with the part held after the trial continuing in consecutive order. The Court Reporter started numbering the pages over again at the beginning of the trial.

telligence Division of the Internal Revenue Service. (Flodin, Tr. 52; Valukas, Tr. 421-22.) At this meeting, Valukas told Flodin about an allegation that Peskin had received a $100,000 fee from K&B for zoning work in Hoffman Estates; that he had seen the billing statement, which appeared to him to be very short for such a substantial sum; and that there was an allegation that a gas station site had been conveyed to Peskin by K&B for transfer to the Mayor of Hoffman Estates. (Flodin, Tr. 51-52; Valukas, Tr. 422-423.) Valukas had received this information either from Royal Faubian, an officer of K&B, or Thomas Foran, K&B's lawyer. (Valukas, Tr. 420.)

Agent Flodin was familiar with the name Peskin because he had a file containing the 1968 and 1969 partnership tax returns of the Deutsch & Peskin law firm, which Flodin had requested in November, 1971. (Flodin, Tr. 41-42, 44.)

Subsequent to this meeting, Valukas gave Flodin a variety of documents relating to the bribery allegation concerning Peskin. (Flodin, Tr. 63-71; Valukas, Tr. 424-426.) Among these were numerous pages of checks, invoices and correspondence relating to services performed by Deutsch & Peskin for K&B, including documents specifically relating to the 1968-69 Hoffman Estates zoning matter which formed the basis for the indictment and which the government introduced at the trial. (DX 8, 9, to 9D.)

On October 5 and October 26, 1972, Royal Faubian, former President of the Illinois division of K&B, was interviewed by FBI agents and he signed a statement implicating Peskin in a bribery scheme in the Village of Hoffman Estates. (DX 10, 10-A.) Sometime before the end of 1972, Valukas sent copies of statements from these interviews to Flodin. (Flodin, Tr. 71.)

Special Agent Flodin's Investigation

Meanwhile, Special Agent Flodin had begun an investigation based upon the information which Valukas had related to him at their luncheon meeting. Flodin had the Deutsch & Peskin partnership tax returns for 1968 and 1969, and he filled out the Internal Revenue form requesting the firm's 1970 and 1971 returns. (Flodin, Tr. 74-75; DX 7, 7A.) The form was returned indicating that Revenue Agent Hein was auditing the 1970 partnership return, and had the file copy of the return. (Flodin, Tr. 76.)

On October 27, 1972, Flodin went from his office at 17 N. Dearborn to Hein's office at 64th and Halsted, Chicago, to talk with him about Hein's audit. (Flodin, Tr. 39, 50; Hein, Tr. 18.) Hein testified that Flodin asked him if he recalled seeing a $100,000 fee from a builder, he thought K&B, on the partnership's books. Flodin told Hein he did not think the law firm had reported the fee. (Hein, Tr. 19.)

Flodin took the 1970 partnership return, Hein's audit report, and other papers back with him to his office. (Flodin, Tr. 50.) Flodin claimed that he looked over the documents and decided that they had no intelligence potential. He said that his full investigation of whether the law firm had reported the $100,000 fee consisted of looking at the 1969 law firm partnership return (which he had before he went to see Hein) and seeing that there were reported fees in excess of $200,000. (Flodin, Tr. 113-114.)

Instead of sending the documents back to Hein's division at that point, Flodin went to see Paul Berwick, a former Special Agent with the Intelligence Division who was then in the Civil Division. Berwick's men had previously worked with Flodin and other Intelligence Agents as cooperating agents in criminal investigations. (Flodin,

Tr. 85-86.) Flodin turned over the documents to Berwick at that meeting. (Flodin, Tr. 97.) During the meeting with Flodin, Berwick called in Agent Melvin Radman, an experienced member of Berwick's group, and told Radman to do an audit on the 1969, 1970 and 1971 returns of both the Deutsch & Peskin partnership and the individual partners. (Flodin, Tr. 80-81; Berwick, Tr. 316-18; Radman, Tr. 160-61, 174.) Radman was shown checks from K&B to Deutsch & Peskin, and billings relating to the $100,000 fee and the gas station site which the government had been informed Peskin transferred to the Mayor. (Radman, Tr. 161, 163.)

Berwick then arranged to have the case transferred to his group, and on November 7, 1972, at his supervisor's request, Agent Hein signed the transfer form (Berwick, Tr. 309; Hein, Tr. 25; DX 2.) Hein testified that his supervisor "probably just told me that the Intelligence Division wanted the return." (Tr. 25.) The supervisor, Mr. Siliger, could recall nothing of the incident. (Tr. 300-04.)

In addition to gathering documents and talking with Hein and Berwick about Peskin, Flodin had Special Agent Michael Sarton of the Intelligence Division check on the title to the gas station site. Sarton conducted a title search which was inconclusive. (Flodin, Tr. 117; Sarton, Tr. 355-358; DX 51.)

Special Agent Neuhauser's Investigation

Meanwhile, another group within the Intelligence Division of the Internal Revenue Service had become involved in the investigation stemming from the Peskin bribery allegations. In September or October, 1972, Assistant United States Attorney Valukas had a telephone conversation with Special Agent Paul Neuhauser, a Group Manager in the Intelligence Division. Valukas told Neuhauser he

had learned that $100,000 in checks had been issued by K&B to the law firm of Deutsch & Peskin, and that he was writing IRS for approval to secure the relevant tax returns. (Valukas, Tr. 538-539.)

After this conversation, Neuhauser attempted to procure the tax returns. He instructed Special Agent Sherbula, of his group, to request the returns of Deutsch, Peskin & Levy, both partnership and individual, for the years 1968 through 1972. In the process of requesting the returns, they discovered that Peskin's personal 1968 and 1969 returns were charged out to another group in the Intelligence Division, namely, Agent Popovit's group.* Neuhauser assembled the tax returns, read them over in relation to the knowledge he had about the $100,000 fee, and put them in a file. (Neuhauser, Tr. 541, 547-49.)

Neuhauser then called Valukas and said he would like to see the checks and invoices Valukas had mentioned. Valukas told Neuhauser he had given them to Special Agent Flodin. Neuhauser went to see Flodin and looked at the checks and invoices. Neuhauser asked Flodin what he planned to do with these and Flodin replied that he was going to give them to the Audit Division. (Neuhauser, Tr. 550-52.)

Neuhauser testified that he gave the tax returns he had accumulated to Special Agent Sherbula to file. When this file was produced at the suppression hearing, Neuhauser read the caption which had been written on the file folder

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* It was stipulated that Agent Popovits had no recollection of seeing Peskin's 1968 and 1969 returns and that Agent Starr, who was in Popovits' group, made a request in November of 1970 for several hundred tax returns of public officials in Cook County, including Peskin's, for a reason unrelated to this case. (Tr. 605.)

by Sherbula—"Deutsch & Peskin—not contacted by I.D. Currently being audited. Attorneys for K&B." (Neuhauser, Tr. 570; Sherbula, Tr. 621; DX 102.)

Radman's Audit

After his meeting with Flodin and Berwick, Agent Radman began work on his audit assignment in November or December, 1972. (Radman, Tr. 173.) He called the law firm of Deutsch & Peskin and spoke with Earl Deutsch, telling him that he had been assigned to audit the partnership and individual returns for 1969, 1970 and 1971. Deutsch told Radman that the 1970 return had already been audited and Radman replied that there were some matters that needed further examination. (Radman, Tr. 174.)

On January 4, 1973, Radman met with the law firm's accountant, Joseph Adelman. (Radman, Tr. 173.) Adelman also pointed out to Radman that the 1970 return had been audited and asked why it was necessary that an additional audit be conducted. Radman recalled telling Adelman that the partners' capital accounts were in negative figures, which could represent a taxable event to each of the partners concerned, and that he wanted to look into this matter, "along with other items that might have a ramification with respect to that consideration." (Radman, Tr. 200-01.) Radman said nothing to Adelman about the $100,000 fee or the gas station site which Flodin and Berwick had discussed with Radman, or about the invoices and checks relating to these items which had been given to Radman. (Radman, Tr. 167.)

Adelman testified that he told Radman he had signed an agreement resulting from Hein's audit just a few months earlier, that he thought Hein had done well in his

audit, and that he was disturbed at being put through all that work again. (Adelman, Tr. 440-41.) Radman told Adelman he needed consents to extend the statute of limitations on the tax returns and Adelman obtained them for him. (Adelman, Tr. 441.)

Radman admitted that he was familiar with §7605B of the Internal Revenue Code which states that only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary. (Radman, Tr. 202-03.) Radman said that, to his knowledge, neither the law firm nor the individuals had received such notification. (Radman, Tr. 203.)

Because the law firm's offices were being remodeled, the records from Deutsch & Peskin were brought to Adelman's office and Radman worked there. (Adelman, Tr. 441-42.)

Adelman, a certified public accountant for over 30 years who had worked with IRS agents on hundreds of audits of his clients' tax returns (Adelman, Tr. 438-39), testified that Radman spent much more time than should have been necessary for the type of audit Radman said he was conducting. Adelman said that ordinarily he would spend an average of two to five days with an agent on that type of audit. (Adelman, Tr. 443-44.) Radman's time records showed that he spent at least 400 hours on this audit through June, 1973. (DX 48.) In addition, Janie Griggs, an IRS employee, testified that she spent two months working full time with Radman on this matter and that some others in the office also worked on it for him. (Griggs, Tr. 403, 406, 410-12.)

David Jacobson, a certified public accountant with Adelman for about 25 years (Jacobson, Tr. 466), who did most of the accounting work for the Deutsch & Peskin firm (Adelman, Tr. 442), testified that Radman submitted voluminous written questions to him and made an independent recap of all transactions, charges and credits for the entire period, which, in his years of experience, Jacobson had never seen an Internal Revenue agent do before. (Jacobson, Tr. 476, 478-79.) Jacobson testified that Radman requested and was given access to the firm's general ledger, all docket sheets, billings and accounts receivable, which included matters going back a number of years, including the years specified in the indictment. (Jacobson, Tr. 486-88); *see also* D. Aff. to Mot. to Sup. at 2, R. 90.)

Eventually it became such a problem to have Radman working in the accountants' office that Adelman asked him to finish the audit back at the law firm's office. However, because the law firm was remodeling and there was no room for him there, Radman took the firm's books and records to his own office and worked on them there. (Adelman, Tr. 448.)

Agent Radman's Contacts With Special Agent Flodin

Between November and February, during the time that Radman was conducting his audit, he had several conversations with Special Agent Flodin about the audit. (Flodin, Tr. 88-89.) Though described as "chance meetings," Flodin testified that he was not working on any other matters with Radman and the only subject they discussed was the Deutsch & Peskin audit. (Flodin, Tr. 89-90.) Flodin said that at one meeting, Radman told him that the $100,000 fee had been reported, that at another meeting Radman

asked Flodin whether he recognized the names of some people to whom the law firm had paid fees (Radman showed Flodin a list of names), and at some of the meetings Radman showed him documents. (Flodin, Tr. 92, 94, 95.) Radman admitted he had conversations with Flodin about the audit, but denied showing him a list of names or fees or any other documents. (Radman, Tr. 223.)

Progress of the United States Attorney's Investigation

Meanwhile, prior to the end of January, 1973, Mr. Valukas had learned that another K&B employee, Maurice Sanderman, was claiming that Peskin was involved in a pay-off in Hoffman Estates. (Valukas, Tr. 648; DX 110 at 2.) At that point, Valukas had information from at least three sources (Valukas, Tr. 650) concerning Peskin's alleged involvement in the Hoffman Estates payment to village officials. These were the statements of Royal Faubian to the FBI in October, 1972 (DX 10, 10a), the documents subpoenaed from K&B in August and September, 1972 (Valukas, Tr. 645), and the statements from Sanderman by the end of January, 1973. (DX 110.)

On February 15, 1973, Valukas subpoenaed Stulberg before the Grand Jury. Stulberg took the Fifth Amendment. The only subject Valukas asked Stulberg about related to the allegations concerning Peskin's involvement in bribery in Hoffman Estates. (Valukas, Tr. 649.)

Special Agent Flodin testified that he received a telephone call from Valukas in February, 1973, or possibly later, in which Valukas asked Flodin what had happened to the documents he gave Flodin concerning Peskin. Flodin testified that he told Valukas he thought the matter was under audit; Valukas asked Flodin to check on the status. (Flodin, Tr. 101.) Flodin then called Radman who told

Flodin the audit was in abeyance then because of another matter of greater priority; Flodin then called Valukas back and advised him of this. (Flodin, Tr. 101.)

Valukas denied calling Flodin to ask for the materials he gave Flodin, but he did recall a conversation in February or March, 1973, with some Special Agent who told Valukas the matter was under audit. (Valukas, Tr. 428.) Valukas said he might or might not have learned at that time that Peskin individually was under audit, but he was aware that the partnership was under audit and that Peskin was a partner of the firm. (Valukas, Tr. 435.)

Special Agent Swanson's Investigation

On April 3, 1973, IRS Special Agent James Swanson was in Assistant U.S. Attorney Valukas' office; Swanson took a telephone call from an anonymous caller. (Swanson, Tr. 368; DX 52.) The caller corroborated the information which Valukas had already received from the three other sources concerning Peskin's alleged involvement in payments to Hoffman Estates officials. Valukas told Swanson he had previously received similar information from other sources. (Swanson, Tr. 375.)

Swanson reported this telephone call to his supervisor, Paul Neuhauser. (Neuhauser, Tr. 576.) Neuhauser is the Intelligence Division Group Manager whom Valukas, in September or October, 1972, had told about the $100,000 fee from K&B to Peskin's law firm and who had assembled the Peskin tax returns. (Neuhauser, Tr. 539.)

After the April 3, 1973 anonymous call, Neuhauser told Swanson about his previous conversation with Valukas concerning the $100,000 payment by K&B to Deutsch and Peskin, and he assigned Swanson to investigate the matter. (Neuhauser, Tr. 576-77.) Upon requesting Peskin's

1970 and 1971 returns, Neuhauser said he was informed, in April, 1973, that Radman was auditing them. (Neuhauser, Tr. 553; Berwick, Tr. 327.)

Swanson conducted the investigation concerning Peskin under Neuhauser's supervision and direction, and Swanson kept Neuhauser advised. (Neuhauser, Tr. 579.) In April, 1973, Swanson mentioned to Neuhauser that the alleged bribe payments were funneled by Stulberg through a law firm or through Peskin to the trustees and village president, and that the amount involved was $50,000 to $70,000, plus a piece of property. (Neuhauser, Tr. 580.) In April or early May, 1973, Swanson reported to Neuhauser that K&B's zoning request had been voted down and then two weeks later approved, and that he had identified some of the trustees who changed their votes. (Neuhauser, Tr. 581.)

Although Valukas and Neuhauser had specific knowledge of the Radman audit at least by April, 1973, (Neuhauser, Tr. 553; Berwick, Tr. 327; Valukas, Tr. 428), Swanson stated that he did not learn of it until May or early June, at which time he was told either by Valukas or Flodin. (Swanson, Tr. 377-78.) On June 5, 1973, Swanson went to Radman, probably presented his credentials (Swanson, Tr. 381), and asked him for the file concerning the Hoffman Estates-K&B rezoning, which had been given to Radman by Berwick and Flodin in November, 1972. (Radman, Tr. 230, 232.) Radman testified that he had never seen Swanson before and did not remember whether he looked at his identification, but when Swanson asked for the Peskin file, "I said, sure, so I went and I gave it to him." (Radman, Tr. 230.)

Also in June, 1973, Neuhauser testified that some of the cases were formally opened on the Trustees in Hoffman Estates (Neuhauser, Tr. 560), and Swanson spoke with Stulberg. (Swanson, Tr. 416.)

On June 28, 1973, Radman found a note on his desk from Berwick, his supervisor, dated June 27, telling him not to contact Peskin or Deutsch until he heard from Berwick. (Radman, Tr. 236.) After that, Radman continued to work on the matter, but did not go to the law firm. (Radman, Tr. 242.)

Radman testified that he was asked to conduct a review of the 1968 partnership and individual returns from materials given him by Swanson. (Radman, Tr. 246.) Radman said he was asked to write up a joint report of 1968 and 1969, which he submitted in October, 1973. (Radman, Tr. 248.) There were some changes relating to the 1968 returns, which Radman had not been asked to audit, but *no changes* at all for 1969. (Radman, Tr. 213-14.) Also, Radman said that he did not file any report concerning the 1970 and 1971 returns which he audited because, despite his extraordinarily lengthy and detailed audit, he found no basis for changes.*

According to Swanson, on September 22, 1973, at a meeting at the office of the United States Attorney, an agreement was made with Earl Deutsch, Peskin's former partner who received immunity for his testimony (DX 115, 116), which gave the government the basis for opening a tax case against Peskin; or, to put it more precisely, in the words of Assistant United States Attorney Fahner who phrased the question which Swanson answered in the

* During the trial Peskin received the bill for the changes made by Hein in the original audit. (Tr. 346.)

affirmative, they now could "make the tax case in prosecutorial terms." (Swanson, Tr. 414-15.)

Three days later, on September 25, 1973, the Internal Revenue Service made it official—it formally opened a file on Bernard Peskin. (Swanson, Tr. 414.) It is on this final act that the government has based its claim that it complied with *Dickerson.*

On October 1, 1973, Defendant Peskin was interviewed by Special Agents Swanson and Langell and, for the first time, was advised of his constitutional rights under *Miranda* v. *Arizona,* 384 U.S. 436 (1966), and *United States* v. *Dickerson,* 413 F.2d 1111 (7th Cir. 1969). (D. Mot. to Sup. at 4, Aff. at 2-3, R. 90.)

The Trial Court's Ruling

Owing to the absence of one of the witnesses, the evidence on the motion to suppress was not completed until after the trial was finished. By then, the trial judge was fully advised that the investigations of Peskin which were being conducted late in 1972—before Radman started his audit—by the grand jury, the United States Attorney and two groups of IRS Special Agents, involved the very same charges which formed the basis for the indictment.

At the close of the evidence prior to trial, the trial court denied Peskin's motion to suppress, stating that the *Dickerson* case created a rebuttable presumption that the date of the transfer of a case to the Intelligence Division was the point at which the case became criminal. The court concluded that at the time of the Radman audit, the government investigation by both the United States Attorney's office and the Intelligence Division had not focused on Peskin to the point where *Miranda* warnings were required. However, the trial judge noted that the evidence revealed "a rather intensive investigative activity of several areas

of suspected wrongdoing, and that the evidence ultimately utilized to obtain the indictment against Mr. Peskin could almost be characterized as an accidental by-product of other investigations." (Tr. 528-29.) This was before the additional two days of hearings held after the trial, when the trial judge learned for the first time about Special Agent Neuhauser's involvement.

At the conclusion of the later hearings, after the trial was over, the trial judge indicated he agreed with the government's position that the eliciting of information from a taxpayer's records in a civil audit was permissible without *Miranda* warnings if the IRS agent proceeded in the good faith belief that no criminal investigation was underway. The court rejected the defense position that the agent was chargeable with the knowledge of any other Intelligence Division activity relating to the defendant. (Tr. 660.)

Ruling Of The Court Of Appeals

The Court of Appeals held that the evidence did not support the contention that Radman's civil audit was a subterfuge in a criminal investigation conducted by either the Intelligence Division or the United States Attorney's office. The Court concluded that petitioner was not entitled to *Miranda* warnings under the *Dickerson* case, and added:

> "Referring to what *Dickerson* found to be the crucial step as 'the transfer of the case to the Intelligence Division' may be somewhat misleading. It is perhaps more accurate to refer to the critical event as the formal opening of the Intelligence Division criminal case."

APPENDIX 6

DEFENSE INSTRUCTIONS RELATING TO EXTORTION WHICH WERE REFUSED BY THE TRIAL COURT

Defendant's Instruction 28:

> "If you find that the defendant gave money to Hoffman Estates public officials solely in order to obtain a fair hearing for Kaufman & Broad on a petition for zoning change, you should consider this on the question of whether defendant intended to influence the performance of the acts of the village officials."

Defendant's Instruction 32:

> "Evidence has been introduced that defendant Bernard Peskin reported to Mr. Stulberg and Mr. Deutsch that village officials of Hoffman Estates demanded that they be paid money as a condition to their approving Kaufman & Broad's petition for change in zoning, and threatened that they would reject Kaufman & Broad's petition if their demands for money were not met.
>
> "If you believe that Mr. Peskin formed no purpose of offering any money or thing of value to the Hoffman Estates public officials, and acted only because he believed that the officials intended to carry out their threat unless their demands were satisfied, then the essential element of intent is not present, and you should find the Defendant not guilty of Counts 3 through 9 of the indictment."

Defendant's Instruction 33:

> "Under Illinois law, a person commits the crime of intimidation when, with intent to cause another to perform or to omit the performance of any act, he communicates to another a threat to perform without lawful authority any one of the following acts:

'(6) Take action as a public official against any one or any thing, or withhold official action, or cause such action or withholding . . .' ch. 38, §12-6, Ill. Rev. Stat. (1973).

"If you find that the public officials named in the indictment intimidated defendant by communicating a threat to him to take or withhold official action against the defendant's client, Kaufman & Broad, Inc., then you should consider this as bearing on the intent of the defendant to commit bribery."

No. 75-1514

In the Supreme Court of the United States

OCTOBER TERM, 1975

BERNARD M. PESKIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner Bernard M. Peskin, defendant-appellant in the court below, files this Supplement in support of his petition for a writ of certiorari filed in this Court on April 21, 1976.

Petitioner wishes to call to the Court's attention the case of *United States* v. *Prince,* 529 F.2d 1108 (6th Cir. 1976), which was not reported at the time when petitioner filed his petition for a writ of certiorari in this Court. The *Prince* case is relevant to petitioner's argument in Section II of his petition entitled "The Court of Appeals'

Decision on the Travel Act Counts Is in Conflict with Rulings of this Court and of Courts of Appeals." (Petitioner's brief at 14-17.)

In Section II A of his brief, petitioner argues that the interstate checks which form the basis for four Travel Act counts are insufficient to invoke federal jurisdiction because, among other reasons, "they were not known to or foreseen by petitioner." (Petitioner's brief at 16.)

In *United States* v. *Prince,* the defendant Prince was convicted under 18 U.S.C. §§1952 and 2. The Court of Appeals held that there is a requirement of a separate intent related to the use of interstate facilities, which is different from the intent required to commit the underlying state offense, concluding:

> "[S]ince Prince was not shown either to have traveled interstate or used interstate facilities, her strictly intrastate activities could not be held to constitute a violation of the Travel Act in the absence of a showing that she knew or reasonably should have known of Pandelli's interstate activities." (529 F.2d at 1112.)

The *Prince* Court rejected the reasoning of *United States* v. *LeFaivre,* 507 F.2d 1288, 1297 (4th Cir. 1974), *cert. denied,* 420 U.S. 1004, in which the interstate activity was treated as a "jurisdictional peg" not requiring proof of knowledge. See also *United States* v. *Miller,* 379 F.2d 483 (7th Cir. 1967), *cert. denied,* 389 U.S. 930, in which the Court held that Section 1952 does not require an intent to violate federal law by using a facility in interstate commerce.

The interstate checks which formed the basis for the four Travel Act counts in petitioner's case were not sent to petitioner. Petitioner never saw or even knew of these checks. The checks were Kaufman and Broad inter-cor-

porate transfers of funds from the Michigan parent company to its fully-owned Illinois subsidiary. Petitioner sent his bills to the Illinois subsidiary and was paid by intrastate checks from the subsidiary.*

There is a direct conflict between the decisions of the Fourth and Seventh Circuits and the Sixth Circuit on an issue of great importance, which should be resolved by this Court.

Respectfully submitted,

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July 1, 1976

* Three Travel Act counts based on payment to petitioner by the subsidiary by means of these intrastate checks were dismissed by the trial judge on the ground that they did not furnish a sufficient basis for federal jurisdiction under the Travel Act.

No. 75-1514

In the Supreme Court of the United States

OCTOBER TERM, 1976

BERNARD M. PESKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-30) is reported at 527 F. 2d 71.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1975 (Pet. App. 31). A petition for rehearing with suggestion *en banc* was denied on March 8, 1976 (Pet. App. 32). On March 29, 1976, Mr. Justice Stevens extended the time for filing a petition for a writ of certiorari to and including April 21, 1976 (Pet. App. 33), and the petition was filed on April 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence regarding use of interstate facilities was sufficient to prove violations of the Travel Act, 18 U.S.C. 1952.

2. Whether the trial court properly restricted cross-examination of government witnesses regarding prior unrelated instances of bribery unknown to petitioner when he committed the charged offenses.

3. Whether the trial court properly ruled that petitioner, if he elected to testify, could be cross-examined concerning other bribery activity in which he had been involved.

4. Whether the trial judge, by his remarks to the jury regarding further deliberations, coerced the jury to render a guilty verdict.

5. Whether the trial court's instructions required petitioner to prove his innocence.

6. Whether the trial judge erred in refusing to suppress voluntary statements made by petitioner to agents of the Internal Revenue Service during non-custodial questioning.

STATUTE INVOLVED

18 U.S.C. 1952 provides in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> * * * * *
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3) shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means * * * (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on five counts of using interstate facilities to promote an unlawful activity (18 U.S.C. 1952, "The Travel Act"), one count of conspiracy (18 U.S.C. 371), and one count of making a false statement on his income tax return (26 U.S.C. 7206(1)).[1] He was sentenced to concurrent three-year prison terms on each count. The court of appeals affirmed in a lengthy opinion (Pet. App. 1-30).

The evidence, which is set forth in detail in the opinion of the court of appeals, shows that petitioner, an attorney, was engaged to provide legal services to Kaufman & Broad, Inc. (K&B), a national corporation engaged in tract home building (Pet. App. 1, 2).[2] In March 1968, K&B, acting through petitioner, contracted to purchase a large tract of land in Hoffman Estates, Illinois,[3] contingent upon its being able to secure desired rezoning (Pet. App. 2). Petitioner's prosecution arose from his efforts to secure such rezoning through payments to various officials of Hoffman Estates.[4]

After preliminary discussions with several village officials, petitioner informed K&B vice-president Edward Stulberg that Mayor Roy Jenkins and Howard Noble wanted $25,000 to approve the rezoning (Pet. App. 2). At the time, there was considerable opposition to housing

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[1]He was acquitted on two other Travel Act counts and a tax charge.

[2]K&B was indicted with petitioner and pled guilty to charges arising from the incidents discussed herein.

[3]The land consisted of two parcels of 320 and 90 acres, respectively.

[4]To obtain a zoning change, K&B had to file a petition with the Zoning Board of Appeals, which would conduct a hearing and make

expansion in Hoffman Estates because of increased burdens on school resources (Tr. 50-51). In July or August 1968, petitioner visited Jenkins at the latter's store and told him that he hoped to secure approval of the zoning proposal as soon as possible (Tr. 552). During their conversation, petitioner used the term, "drop." Jenkins responded, "you mean money"; and petitioner replied, "[y]es" (Tr. 551). Jenkins then said that he was uncertain whether money would insure passage of the rezoning, but that he would talk to the other Board officials involved. Board members Pinger, Meyer, and Gibson subsequently told Jenkins that they would vote for rezoning in return for payment, and Jenkins told petitioner that he would try to secure the cooperation of other Board members as well (Tr. 556-560).

On September 26, 1968, Pinger, representing the Zoning Board of Appeals, recommended the rezoning to the Board of Trustees. The matter was tabled until October 10. On October 10, with Jenkins, Meyer, Gibson, and Cowin voting affirmatively, the motion passed (Tr. 564-565). Five days later, however, an ordinance embodying the zoning change was defeated with Cowin, Noble, Sloan and Franck voting against it (Pet. App. 2). Two more meetings between petitioner and various Board members ensued and on October 24, 1968, with K&B's Stulberg present, a motion to reconsider the October 15 action was passed (Pet. App. 3).

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a recommendation to the village's Board of Trustees. The Board then would conduct another hearing and make the ultimate decision whether the zoning change should be adopted (Tr. 76). If the zoning change was approved, the Trustees would adopt an ordinance embodying the change. Six village officials, Roy Jenkins, James Sloan, Howard Noble, Gerald Meyer, Herbert Gibson, and Edward Pinger, pleaded guilty to various charges arising from the rezoning activity.

After the October 24 meeting, petitioner told Jenkins that K&B would pay $35,000 when the rezoning was accomplished and another $35,000 during the construction period (Pet. App. 3).[5] Jenkins then told Pinger, Noble, Meyer, Gibson, and Sloan that time was running out on the K&B contract and that the company would pay $5,000 per person for favorable votes (Tr. 577-578, 827). On October 30, ordinances relating to the 320-acre parcel were passed, with Noble, Sloan, Gibson, and Meyer voting for them (Tr. 102, 578-579). On November 14, a favorable ordinance relating to the 90-acre parcel was passed, with the same parties voting affirmatively (Tr. 580). Between October 30 and November 30 petitioner gave Jenkins a package containing $35,000 in cash, which Jenkins divided among himself, Noble, Sloan, Meyer, Gibson, and Pinger (Tr. 580).[6]

The funds paid to the officials came directly from petitioner, who was to be reimbursed by K&B in the guise of legal fees. Petitioner received $10,000 on November 14, 1968; $25,000 on January 14, 1969; another $10,000 on February 25, 1969; and $55,000 on April 10, 1969 (Pet. App. 4).[7] The payments were made from a Chicago subsidiary of K&B account in Detroit (Pet. App. 6). The reimbursements from Detroit were necessary to give the Chicago subsidiary sufficient funds to cover the payments it made to petitioner (Pet. App. 6).[8] In addition, on

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[5]Jenkins also indicated a desire for a gas station site on the 90-acre parcel (Tr. 104-105).

[6]Since the officials involved were later defeated or did not seek reelection, the second $35,000 was not paid (Pet. App. 3-4).

[7]This sum was more than his $35,000 expenditure in order to compensate for his resultant higher tax liability and to cover his fee (Pet. App. 6).

[8]The sending of the four checks by K&B from Detroit to the Chicago subsidiary constituted four of the five Travel Act violations. The fifth was predicated upon Stulberg's trip from Detroit to Illinois

December 24, 1968, petitioner's partner, Deutsch, issued checks to two young lawyers, who cashed them, kept part of the proceeds for taxes, and remitted the balance to Deutsch. Deutsch testified that the purpose of this exchange was to generate cash for petitioner to pay village officials (Pet. App. 4).

ARGUMENT

1. Petitioner challenges the jurisdictional basis for his convictions on four counts under the Travel Act, 18 U.S.C. 1952, contending that the use of interstate facilities was too remote and that the illegal activity had concluded before passage of the relevant checks in interstate commerce. Petitioner does not contest his conviction on the fifth Travel Act count, for which he received an identical concurrent sentence. *Barnes* v. *United States*, 412 U.S. 837, 848, n. 16.[9]

a. Petitioner contends that the payment of money from K&B's Detroit bank to its Illinois subsidiary, to replenish funds used to reimburse petitioner for his bribery payments, constituted too remote a use of interstate facilities to invoke jurisdiction under the Travel Act. But this scheme, involving the bribery of public officials by a large national corporation operating on a multistate level, was hardly a local operation to which the use of interstate facilities was fortuitous or incidental. To the contrary, petitioner was in constant contact with K&B officials in Detroit (see n. 10, *infra*), and K&B's ability to transfer funds from its

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to attend the October 24 meeting at which the Board voted to reconsider the zoning ordinances.

[9]In *Barnes*, this Court declined "as a discretionary matter," 412 U.S. at 848, n. 16, to consider petitioner's challenges to his convictions on four counts, after affirming his convictions on two counts for which he had received identical concurrent sentences.

Detroit headquarters to Illinois was vital to the execution of its corrupt plan. It does not matter that the interstate checks were not themselves used to pay the village officials, for petitioner obviously would not have spent his own funds without the contemplated reimbursement from K&B. Nor is it reasonable to claim, as petitioner does, that it was unimportant to the unlawful activity "when, how or even whether the bank account of the K&B subsidiary was replenished" (Pet. 16), for, as the court below found, the subsidiary could not have paid petitioner unless its account had been bolstered by funds from Michigan (Pet. App. 6).[10]

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[10]Petitioner also argues that he did not know of or foresee K&B's use of interstate facilities (Supplemental Petition for Certiorari). Certainly petitioner was not unaware of the interstate nature of K&B's business, for he knew that Stulberg operated from Detroit and often called him there (Tr. 30-36, 45, 73, 78, 83, 132-136, 141). While petitioner sent his bills to the local K&B office, they were addressed to Stulberg's attention. As the court of appeals noted: "[T]he interstate scope of the unlawful activity is clear, and was known to Peskin." Pet. App. 10. Furthermore, the plan to shift funds interstate was obviously known to K&B, petitioner's co-conspirator, and petitioner is chargeable with that knowledge. *Pinkerton* v. *United States*, 328 U.S. 640.

In any event, the circuits are in substantial agreement that knowledge of the use of interstate facilities is not an element of a Section 1952 offense. See *United States* v. *Doolittle*, 507 F. 2d 1368, 1372 (C.A. 5), affirmed *per curiam*, 518 F. 2d 500 (*en banc*); *United States* v. *LeFaivre*, 507 F. 2d 1288, 1297 (C.A. 4); *United States* v. *Hanon*, 428 F. 2d 101, 107-108 (C.A. 8), certiorari denied, 402 U.S. 952; *United States* v. *Sellaro*, 514 F. 2d 114, 121 (C.A. 8), certiorari denied, 421 U.S. 1013; *United States* v. *Roselli*, 432 F. 2d 879, 890-893 (C.A. 9), certiorari denied, 401 U.S. 924; *United States* v. *Colacurcio*, 499 F. 2d 1401, 1406 (C.A. 9); *United States* v. *Smaldone*, 485 F. 2d 1333, 1348, n. 10 (C.A. 10), certiorari denied, 416 U.S. 936. Cf. *United States* v. *Feola*, 420 U.S. 671. While the Sixth Circuit has taken a somewhat different view, *United States* v. *Barnes*, 383 F. 2d 287, certiorari denied, 389 U.S. 1040; *United States* v. *Prince*, 529 F. 2d 1108, even that circuit requires no more than reason to know about use of an interstate

There is no conflict within the Seventh Circuit or among the circuits on this issue. As the court of appeals noted (Pet. App. 8-9), "[t]he significance of the use of interstate facilities in this case differs markedly" from the significance in the other Seventh Circuit cases cited by petitioner. Thus, in *United States* v. *Altobella*, 442 F. 2d 310 (C.A. 7), an extortion victim cashed a check and used the proceeds to pay off the perpetrators of the extortion. Interstate facilities were involved only because the victim's check was drawn on an out-of-state bank. Similarly, in *United States* v. *Isaacs*, 493 F. 2d 1124 (C.A. 7), a check drawn on a co-defendant's Illinois account to distribute bribery proceeds fortuitously happened to clear through the St. Louis Federal Reserve Bank. In neither case was the use of an out-of-state bank part of the illegal plan. The Second Circuit case relied on by petitioner (Pet. 15, 16), *United States* v. *Archer*, 486 F. 2d 670, also is beside the point. In *Archer*, officials investigating a local bribery operation purposely sent an undercover agent from New York to New Jersey in order to receive phone calls from the defendants and thus create federal jurisdiction. No such government-manufactured jurisdiction exists here.

b. Alternatively, petitioner contends that all illegal activity ceased before passage of the checks from the Detroit bank and that, consequently, he did not "thereafter" attempt to perform any acts within the meaning of 18 U.S.C. 1952. The court of appeals correctly rejected that contention in an opinion on which we rely (Pet. App. 11-12).

In brief, the court of appeals found that petitioner had agreed to make further payments as construction proceeded

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facility, a standard which is satisfied by the record here. Thus, there is no need in this case to resolve the apparent conflict between the circuits.

and also to transfer real estate. As the court noted (*ibid.*) petitioner continued to promote this unlawful activity after the checks were sent. He arranged, through his partner, to have two associates cash checks in December 1968, and return the funds to him in order, he claimed, to obtain cash needed for village officials. He also sought in 1971 to get K&B to transfer the real estate promised to Jenkins (*ibid.*).

The original bribery payments, and the payments to petitioner from Detroit, therefore were a necessary predicate to the success of the further bribery (Pet. App. 11). Far from being the final act in a limited plan, that series of payments was an intermediate step in a more comprehensive program. Also, the sending of each of the last three Detroit checks was an unlawful act occurring after the passage of any previous check. Thus, as the court of appeals pointed out (Pet. App. 12), petitioner's argument, even if meritorious, would be relevant only to Count 9.

2. Petitioner contends (Pet. 11-14) that rulings of the trial court regarding the limits of cross-examination, as well as certain instructions and remarks to the jury, deprived him of important constitutional rights. The court of appeals correctly ruled that these arguments, individually and collectively, are without merit.

a. The trial court permitted petitioner to cross-examine village officials about whether they had ever received money from others in return for favorable votes. Each responded that he had (Tr. 863-864, 915, 1044). Petitioner nonetheless contends that his cross-examination was improperly restricted because the trial court did not in addition permit him to probe the specific details of these other unrelated instances. Such details were necessary, petitioner argues, to establish his defense of coercion and to impeach the officials' credibility.

A trial judge necessarily has broad discretion to monitor the examination of witnesses, *Geders* v. *United States*, No. 74-5968, decided March 30, 1976, slip op. 6, especially regarding collateral matters. *United States* v. *Kirk*, 496 F. 2d 947 (C.A. 8). In this case the trial judge recognized that the credibility of the village officials was a proper subject for cross-examination but, once the prior acceptance of bribes had been established, declined to allow a sweeping inquiry into all the details of former transactions. That ruling was entirely proper. As the court of appeals noted (Pet. App. 22):

> At best for defendant, the probative value of these payments in other instances is open to question. As the Second Circuit recently observed: "Almost every bribery case involves at least some coercion by the public official; the instances of honest men being corrupted by 'dirty money,' if not nonexistent, are at least exceedingly rare." *United States* v. *Kahn*, 472 F. 2d 272, 278 (2d Cir. 1973), *cert. denied*, 411 U.S. 982. Accordingly, evidence that the officials previously, or on this occasion demanded money carries little weight in a case such as this.

Since the officials did admit receiving prior payments, there is no merit to petitioner's suggestion (Pet. 7) that "the case went to the jury with the trustees still in the role of fallen angels."[11]

[11]The cases cited by petitioner are not on point. The evidence sought to be admitted in *Chambers* v. *Mississippi*, 410 U.S. 284, was not tangential but highly relevant, even crucial, to the central issue in that case. *Gordon* v. *United States*, 344 U.S. 414, and *United States* v. *Dickens*, 417 F. 2d 958 (C.A. 8), both involved rulings which totally blocked inquiry into a witness's motive for testifying. Here, the witnesses' credibility was already called into question by the testimony regarding prior bribes, and the district court could reasonably conclude that further collateral inquiry would be unlikely to produce material evidence.

The relevance of the sought-after testimony is made even more questionable by the fact that petitioner was unaware of any previous payments at the time he developed his bribery plans (Tr. 609-610). Since a claim of coercion challenges the element of intent embodied in the bribery offense, *United States* v. *Kahn*, 472 F. 2d 272 (C.A. 2), certiorari denied, 411 U.S. 982; *United States* v. *Barash*, 365 F. 2d 395 (C.A. 2); *United States* v. *Miller*, 340 F. 2d 421 (C.A. 4), it is difficult to see how petitioner's will could have been overborne in any way by events of which he had no knowledge. Furthermore, the purchase of land by K&B was expressly conditioned upon permission to rezone. Had the Board of Trustees refused to allow rezoning without a bribe, K&B would have been able to walk away from the purchase without further obligation and with no grave consequences to its business. Cf. *United States* v. *Kahn*, *supra*. Moreover, petitioner was not a principal of K&B, but its attorney; he thus had no interest that could have been subject to an effective extortionate threat.

b. Petitioner also challenges the trial court's advance ruling[12] that if he chose to testify, he would be subject to cross-examination about another bribe attempt in which he was personally involved. He argues that this decision intimidated him from testifying. The record shows that petitioner, while representing K&B in 1971, offered money to a public official to secure a sewage line to one of K&B's projects. The trial court reasoned that the government could properly disclose this other event to challenge any statement by petitioner on direct examination that he lacked the necessary intent to commit bribery.

No error inhered in this ruling. It is well established that evidence of similar acts is usually admissible to establish, among other matters, the element of intent.

[12]Petitioner sought the rulings prior to deciding whether to testify.

See, *e.g.*, Rule 404, Fed. R. Evid. Contrary to petitioner's suggestion of irrelevance, it would have been quite pertinent, had he claimed to have been an innocent victim, to show that he had offered the same type of bribe to another government agency, on behalf of the same client for the purpose of facilitating another building project. See *United States* v. *Koska*, 443 F. 2d 1167 (C.A. 2), certiorari denied, 404 U.S. 852.[13] The fact that the prospect of disclosure of this additional bribery bore upon petitioner's decision whether to testify simply reflects a tactical consideration properly imposed by the adversary system. "It is not thought overly harsh in such situations to require that the determination whether to waive the privilege [against testifying] take into account the matters which may be brought out on cross-examination." *McGautha* v. *California*, 402 U.S. 183, 215.

c. Petitioner also contends that the instructions on the extortion defense impermissibly shifted the burden of proof to him.[14] According to petitioner he was unable

[13]The cases cited by petitioner on this point involved matters of dubious relevance at best and are not apposite. *Boyd* v. *United States*, 142 U.S. 450, 458, held that earlier robberies by the defendant were not relevant for identification purposes to a later murder charged against the defendant. In *White* v. *United States*, 294 F. 2d 952 (C.A. 9), a drug possession and sale case, the court held inadmissible other drugs found on the patio of a house after the defendant had vacated the premises. In *United States* v. *Phillips*, 401 F. 2d 301 (C.A. 7), the court held that a prior offense for which the defendant was acquitted should not be admitted. In such cases, unlike the case here, the value of the evidence was slight and was far outweighed by the possible prejudicial effects.

[14]The instructions were as follows (Pet. App. 22-23):

> If you find that the public officials named in the indictment communicated a threat to the defendant that unless paid they would take action as public officials against Kaufman and Broad's zoning proposal, you may consider this in determining whether the defendant intended to commit bribery.
>
> * * * * *
>
> In determining whether the defendant was a victim of extortion, such as to negate his alleged criminal intent to bribe, it is relevant, but not controlling, whether Peskin or Jenkins first raised the question of money. Unless the extortion is so overpowering as to negate the criminal intent of wilfullness, it is not a total defense to bribery charges.

to rebut Jenkins' testimony that petitioner first raised the subject of money, since he elected not to testify. But the instructions on this issue did no more than inform the jury that it could consider whether petitioner or Jenkins first mentioned money and that, regardless of its conclusion on that question, the degree of coercion must be substantial before personal will is overborne. The instruction did not shift the burden of proving guilt away from the government, for the court repeatedly cautioned the jury that the prosecution must prove beyond a reasonable doubt all elements of the Section 1952 offenses, including bribery, and accordingly must show that petitioner intended to influence the officials (Tr. 1965-1966, 1883, 1888). Viewed in the context of the entire charge, *Cupp* v. *Naughten*, 414 U.S. 141, 147, the challenged instruction clearly did not shift the burden of proof.

d. Petitioner also attacks, as shifting the burden of proof, an instruction to the jury that "unless and until outweighed by evidence in the case which leads you to a different or contrary conclusion, you may find from the defendant's signature at the bottom of his [tax] return that he had knowledge of the contents of that return."[15] This charge was given in relation to the

[15]"A defendant's knowledge of the contents of the tax return may be inferred from the facts and circumstances of the case, and the signature at the bottom of the tax return is *prima facie*

tax evasion count of which petitioner was acquitted and not the false filing charge upon which conviction was returned. Although willfullness is also an element of the false statement count, other instructions on that count made clear that carelessness or inadvertence was a defense (Tr. 1897). The jury was also instructed that the government must prove beyond a reasonable doubt that the contents were materially false and that the signer knew they were false. Thus the jury instructions, considered as a whole, *Cupp* v. *Naughten, supra,* were not misleading or erroneous.[16]

e. Finally, petitioner argues that he was prejudiced because the trial judge supposedly "pressed" the jury for a verdict. The facts do not support that contention. After the jury had deliberated for two and one-half days, during which time it had been sequestered at night, the trial judge told counsel that he would allow the jury to deliberate until 10:00 p.m. that night. At that point he said that he would accept a verdict on any counts on which they had managed to agree or declare a mistrial if no agreement had been obtained. He did not make this decision known to the jury when they were brought to the court at 9:30 p.m., however, but merely asked them if they could reach a verdict by 10:00.[17]

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evidence that the signer knew the contents thereof, which is to say, that unless and until outweighed by evidence in the case which leads you to a different or contrary conclusion, you may find from the defendant's signature at the bottom of his respective return that he had knowledge of the contents of that return" (Tr. 1898).

[16]In any event, the inference is a reasonable one. Although the jury was not required to accept the inference, it would hardly be strained to infer that petitioner, a lawyer concerned with manipulating a complex bribery scheme, would make sure that his tax return reflected the covering transactions, which he had taken substantial trouble to devise.

[17]THE COURT: Please be seated, ladies and gentlemen. It has been a long day for you and I thought I better call you out at this late hour to ask you some questions. We have learned that Mr. Brown is the foreman. Mr. Brown, first it is important that you understand in any response to any of my questions are you to disclose how the Jury stands in any area where they are in disagreement; for or against, number, or anything of that sort. My first question is—and I gather that we all know the answer to this—have you yet reached a verdict as to all the counts in the indictment?

THE COURT: You have not. All right. Do you think that if you were allowed to deliberate, let's say, another half hour—and I don't intend to keep you in there any longer than that—you might reach a verdict as to all of the counts in the indictment?

FOREMAN BROWN: Yes.

THE COURT: You believe that you are close to a verdict on the complete indictment then?

FOREMAN BROWN: Possibly.

THE COURT: Now, let me ask all the members of the Jury, by a show of hands, to tell me, do you think it would be profitable and possible to reach a complete agreement on all counts of the indictment if you deliberated worthwhile to do that? Show of hands?

Well, we will do that then. If you will retire again, we will call you out again at 10:00 o'clock (Tr. 1938-1939).

Petitioner made no objection to this statement (Pet. App. 26). The jury then retired, and shortly thereafter announced a guilty verdict on five Travel Act counts and one tax count, and a not guilty verdict on two Travel Act counts and another tax count.

Since petitioner made no objection, reversal would be warranted only if the judge's statement constituted plain error. See Fed. R. Crim. P. 52(b). We submit that it could rarely, if ever, be plain error so long as the judge's statement is phrased neutrally, since such statements, to the extent they pressure a verdict, could as likely favor the defense as the prosecution. The failure of the defense

to object may thus properly be presumed to reflect a tactical decision to accept any effort to produce a verdict.

In any event, the judge did not tell the jury that it must reach a verdict,[18] but merely inquired if they were close to a verdict and could profitably spend another half-hour in deliberations. As the court of appeals noted, "the jurors may have reasonably interpreted his statement [to mean] that he would send them to their hotel rooms in preparation for another day's deliberations" (Pet. App. 27). This view, we submit, is fortified by the fact that, as the court below also noted, the trial court had twice previously cautioned the jury "that they should not surrender honest opinions as to the weight of the evidence 'for the mere purpose of returning a verdict' " (Pet. App. 27).

3. Petitioner also argues (Pet. 17-22) that a civil audit of his finances by the Internal Revenue Service was really a subterfuge for criminal investigation and that accordingly he should have been given *Miranda* warnings. The court below expressly found that the civil audit was not conducted disingenuously (Pet. App. 18-19).

In any event, petitioner was not entitled to *Miranda* warnings. As this Court held in *Beckwith* v. *United States*, No. 74-1243, decided April 21, 1976, a suspect must receive *Miranda* warnings only when he is the subject of a custodial interrogation. That did not occur here.

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[18]Compare *Jenkins* v. *United States*, 380 U.S. 445, 446, where the trial judge told the jury that "[y]ou have got to reach a decision in this case."

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1976.

No. 75-1514

In the Supreme Court of the United States

OCTOBER TERM, 1975

BERNARD M. PESKIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY

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REPLY BRIEF TO BRIEF OF THE UNITED STATES IN OPPOSITION

I.

A COMBINATION OF ERRONEOUS EVIDENTIARY RULINGS, JURY INSTRUCTIONS, AND COERCION OF THE JURY'S VERDICT DEPRIVED PETITIONER OF FUNDAMENTAL CONSTITUTIONAL RIGHTS.

[Govt. Brief, pp. 9-16]

In its brief in opposition, the government has ignored the devastating collective effect of the erroneous and in-

consistent rulings of the trial judge, the instructions given to the jury, and the trial judge's remarks to the jury after two and a half days of deliberation. We believe that each individual error requires a new trial; when viewed together, the effect of the trial judge's errors was so fundamentally unfair that petitioner was deprived of all semblance of due process of law. Particularly in light of the cumulative impact of these errors, which effectively precluded petitioner from presenting his defense, this Court should exercise its supervisory powers and reverse petitioner's conviction.

A.

[Govt. Brief, Part 2a, pp. 9-11.]

In its answer to petitioner's contention that he should have been allowed to cross-examine village officials about their prior and contemporaneous illegal acts of extortion, the government has ignored the central point. The government argues that "details" relating to instances in which village officials received money for votes in other zoning cases are unimportant for purposes of impeaching the credibility of the village officials. Petitioner did not offer this evidence primarily for the purpose of impeaching the credibility of the village officials, although this was a secondary and valid reason for the admission of the evidence.

Petitioner offered testimony relating to prior extortions by the village officials, petitioner's accusers, primarily to demonstrate the likelihood that money was extorted from petitioner, and hence he was not guilty of bribery under Illinois law as charged in the indictment. The proof went to the heart of the charge and petitioner's defense to the charge. Thus, during a discussion in chambers, the trial judge stated that petitioner's intent when he paid Mayor

Jenkins was "really the fundamental issue in the case, and virtually the only issue in the case." (Tr. 1526-27.) The trial judge himself recognized the relevance of who first brought up the question of payment of money. The judge gave the instruction (quoted at page 13 of the government's brief) that "in determining whether the defendant was a victim of extortion, such as to negate his alleged criminal intent to bribe, it is relevant, but not controlling, whether petitioner or Jenkins first raised the question of money." But while the trial judge recognized the relevance of this question, he virtually foreclosed petitioner from demonstrating to the jury the likelihood that Jenkins first proposed the idea of a pay-off. Petitioner's attorney was allowed to ask each trustee-witness only the single question of whether he had ever received money for a vote before. He was not allowed to advise the jury of the number of occasions or the circumstances or the instigator of the previous payments.

Contrary to the impression left with the jury, the FBI statements of the trustee-witnesses showed a systematic and pervasive pattern of extortion which existed prior to and contemporaneously with the payment in this case. (See Defendant's Offer of Proof, filed March 28, 1974.)

We strongly urge this Court to read Defendant's Offer of Proof, which was impounded by the trial court because of the sensitive material it contains. This offer of proof, complete with verifying statements of the trustee-witnesses to FBI agents, details incident after incident of cash payments, as well as the formation of three corporations through which contracts and money were funnelled to village officials in the elaborate and sophisticated extortion scheme existing in Hoffman Estates long before and at the time of the payment in this case. The same village officials who were petitioner's accusers at trial

were receiving so many pay-offs from so many different builders around the time of the payment in this case that they had difficulty keeping the payments and amounts straight. (Offer of Proof, 5, 9; Exs. 3, 7.) One trustee aptly capsulized the climate in Hoffman Estates around 1968 when he was asked by a government investigator whether he received money for a particular rezoning; he replied that he did not recall, but since they already had that same builder paying for two other rezonings, they "certainly would not have let him go free for this one." (Offer of Proof, Ex. 3.)

The jury learned nothing of the trustees' pattern of extortion; rather, they heard former Mayor Jenkins—the mastermind of the sophisticated extortion program which had been rampant in Hoffman Estates for years before petitioner arrived on the scene—claim he was "shocked" when petitioner mentioned money to him (Tr. 726). The jury was told only that the trustee-witnesses had, at some other unspecified time, received an unspecified amount from some unidentified source in exchange for a vote on an unidentified issue. It is ironic that the trial judge instructed the jury that it was relevant to determine who first brought up the question of money, for he almost completely precluded petitioner from adducing any evidence on this "relevant" question.

In its brief, the government states that the trial judge declined to allow "a sweeping inquiry into all the details of former transactions." In discussions with the judge, and in the offer of proof, petitioner fruitlessly offered to limit his inquiry in any reasonable manner which the trial judge might designate. (Tr. 1374; Defendant's Offer of Proof at 17.)

The government also states (at p. 11) that petitioner was not a principal of Kaufman & Broad ("K&B"), and

thus had no interest that could have been subject to an effective extortion threat. The government overlooks that petitioner was to receive a finder's fee in the event that the sale of the land in Hoffman Estates, which was contingent upon rezoning, was consummated. (Tr. 16.) Threat of loss of this income is sufficient to support a finding of extortion. *United States* v. *Staszuk,* 502 F.2d 875, 877-78 (7th Cir. 1974), *modified,* 517 F.2d 53 (7th Cir. 1975); *United States* v. *Addonizio,* 451 F.2d 49, 59 (3d Cir. 1972), *cert. denied,* 405 U.S. 936; *United States* v. *Hyde,* 448 F.2d 815, 833 (5th Cir. 1971), *cert. denied,* 404 U.S. 1058; *United States* v. *Sopher,* 362 F.2d 523, 527 (7th Cir. 1966).

The government also argues that petitioner could not have had his will overborn and thus been subject to coercion because he did not know of the prior extortions. This argument does not square with the facts—petitioner was aware of prior extortions and so informed his client Stulberg (Tr. 235-237). Aside from this, however, under the trial judge's instruction that it was relevant who first brought up the subject of money, it does not matter whether petitioner was aware of the prior extortions. Evidence of the prior extortions by the village officials tends to support petitioner's claim that Jenkins and his fellow trustees were the instigators in this case, and is thus relevant on the issue of intent. See *United States* v. *Barash,* 365 F.2d 395, 401-02 (2d Cir. 1966). *Cf. Griffin* v. *United States,* 336 U.S. 704, 718 (1949); *Griffin* v. *United States,* 183 F.2d 990, 992 (D.C. Cir. 1950); *Campbell* v. *Illinois,* 16 Ill. 16, 17 (1854).

B.

[Govt. Brief, Part 2b, pp. 11-12.]

The government states that the record shows petitioner offered money to a public official on another occasion. The record does not show this. Rather, there was a discussion

in chambers indicating that if petitioner testified on his own behalf the trial judge would allow certain material to be opened up under cross-examination or in rebuttal relating to a conversation which occurred more than two years after the Hoffman Estates matter. There is no direct testimony by any witness on this subject.

In its brief, the government further obscures the fact that the incident occurred more than two years *after* the incident involved in this case, and did not involve Hoffman Estates. In *United States* v. *Koska,* 443 F.2d 1167, 1169 (2d Cir. 1971), *cert. denied,* 404 U.S. 852—the only case upon which the government relies (Br. p. 12)—the evidence related to a *prior* incident. Moreover, the government ignores the settled principle that the trial judge is required to weigh the probative value against the prejudicial effect of evidence concerning the other incident. It was fundamentally unfair for the trial judge to rule that petitioner could be questioned about a single incident which occurred two and one-half years after the K&B rezoning in Hoffman Estates, but refuse to permit petitioner's accusers to be asked about their numerous extortions from other Hoffman Estates builders just before and at the same time as the K&B rezoning.

C.

[Govt. Brief, Parts 2c-d, pp. 12-14]

The government contends that the instructions which petitioner claims shifted the burden of proof to him were not erroneous, citing *Cupp* v. *Naughton,* 414 U.S. 141, 147 (1973). The facts in *Cupp* distinguish that case from petitioner's case. In *Cupp,* an instruction was given stating that every witness is presumed to speak the truth, but that presumption may be overcome by other factors, such as the manner in which the witness testifies, the nature of

the testimony, evidence affecting his or her character, interests, or motives, by contradictory evidence, or by a presumption. That instruction has no relation to the instructions at issue here.

Regarding the tax instruction, the trial court stated that "unless and until outweighed by evidence in the case which leads you to a different or contrary conclusion, you may find from the defendant's signature at the bottom of his return that he had knowledge of the contents of that return." The presumption created by this instruction can only be rebutted by the defendant's testimony that he did not know the contents of his return. Thus, this instruction creates an intolerable tension for a defendant, who is forced either to relinquish his constitutional right not to testify, or to allow the jury to accept the conclusion that his signature proves his knowledge. The instruction was particularly devastating in this case, because petitioner desired to testify on his own behalf but could not because of the trial judge's erroneous ruling about cross-examination discussed in Part B above.

Similarly, in regard to the extortion instruction, the statement that, unless the extortion is so "overpowering" as to negate criminal intent, then extortion is not a total defense to bribery charges shifts the burden of proof to the defendant. Petitioner was prevented from testifying himself *and* was prevented by the trial judge's ruling from eliciting testimony from the trustees which would have tended to show the overpowering effect of the extortion on petitioner.

The government contends that the tax instruction was given in relation to the personal tax evasion count upon which petitioner was found not guilty (Count 15), and not the false partnership return filing charge

upon which defendant was convicted (Count 16). There is nothing in the instruction itself or in the record which indicates that the jury was to limit its consideration of this instruction to the tax evasion count. In fact, the wording of the instruction indicates that it is to be applied to any tax return, and thus the jury could not be expected to distinguish between the counts in applying this instruction.

D.

[Govt. Brief, Part 2e, pp. 14-16.]

In light of the seriousness of the other errors committed by the trial court, it is difficult to understand how coercing a verdict from the jury can be said to be harmless error. It surely cannot be said beyond a reasonable doubt that the court-ordered 30-minute cutoff in this case had no effect on the verdict. *Chapman* v. *California,* 386 U.S. 18, 24 (1967).

II.

THE TRAVEL ACT CHARGES ARE INSUFFICIENT TO SUPPORT FEDERAL JURISDICTION.

[Govt. Brief, Part 1a, pp. 6-8.]

The government's own attempts to distinguish Seventh Circuit cases relating to the Travel Act supports petitioner's position. The government states that the plan to shift funds interstate was known to K&B, petitioner's alleged co-conspirator, and therefore petitioner is chargeable with that knowledge. However, knowledge is not the issue involved in this point of law. In *United States* v. *Altobella,* 442 F.2d 310, 313-15 (7th Cir. 1971), the defendants knew that their extortion victim planned to cash a

check in order to obtain cash; they knew that the victim was from out of state and therefore that his check probably would be drawn on an out-of-state bank. The Court of Appeals held that the Travel Act required a more significant use of a facility of interstate commerce in aid of the defendants' unlawful activities, and the use of the mails by the bank through which the victim's check cleared was incidental to the scheme. See also *United States* v. *Isaacs,* 493 F.2d 1124, 1146-49 (7th Cir. 1974), *cert. denied,* 417 U.S. 976; *United States* v. *McCormick,* 442 F.2d 316, 318 (7th Cir. 1971).

In the present case, K&B's way of handling intercorporate funds was even more incidental to the alleged bribery plan than the interstate activity in *Altobella* or in *Isaacs.* The K&B inter-company transfers were not involved in the plan to pay or the payment to the trustees. The intercorporate transfers of funds were fortuitous, remote, and immaterial to the alleged bribe.

The fifth Travel Act count (Count 5) should be reversed because it is based upon a single trip by Stulberg which was not attributable to or caused by petitioner and which (as Counts 6-9) was incidental and immaterial to the alleged crime. The charge that petitioner conspired to violate the Travel Act (Count 1) should logically fall with the substantive counts.

B.

[Govt. Brief, Part 1b, pp. 8-9.]

The government argues that our contention that there were no illegal activities after the intercorporate transfers is relevant only to Count 9. The government ignores *United States* v. *Zemater,* 501 F.2d 540, 544 (7th Cir. 1974), in which the Court below held that the sequence of

the use of interstate facilities and the violation of state law is jurisdictional, and that under 18 U.S.C. §1952 the activity which comes after the use of interstate facilities must constitute a violation of the law of the jurisdiction in which the activity occurred. In the present case then, the activity must violate the Illinois bribery statute. Under Illinois law, the crime of bribery consists of promising, tendering, receiving or agreeing to accept consideration in violation of the provisions of the statute. No consideration was promised, tendered, received or agreed to after the transfers of funds alleged in Counts 6 through 9.* Thus, no act constituting bribery in violation of Illinois law was performed after the intercorporate transfers of funds alleged in any of those counts.

III.

EVIDENCE GATHERED BY THE INTERNAL REVENUE SERVICE BY TRICKERY AND FRAUD SHOULD HAVE BEEN SUPPRESSED.

[Govt. Brief, Part 3, p. 16.]

The government states that under *Beckwith* v. *United States,* No. 74-1243, decided April 21, 1976, petitioner was not entitled to *Miranda* warnings when he furnished information to Internal Revenue Service agents conducting an audit of his tax returns. However, the government does not discuss the alternative bases espoused by petitioner indicating why the evidence gathered by the Internal Revenue Service should have been suppressed in his case. As set forth in our petition, we contend that it should

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* The reimbursement of petitioner by K&B did not and could not violate or facilitate a violation of the Illinois bribery statute, and thus cannot furnish the requisite jurisdictional base for conviction under the Travel Act. (Ch. 38, §33-1, Ill. Rev. Stat. 1967.)

be suppressed because of the fraud and trickery engaged in by the Internal Revenue Service in conducting a purported civil audit which was in reality a subterfuge for a criminal investigation. The facts supporting this inference are set forth in detail in Appendix 5 to petitioner's petition for a writ of certiorari. This is an issue of great importance that was not reached in *Beckwith,* which should be considered by this Court.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that this Court grant a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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V.

Bd. of Fire and Police Comm'rs., Etc.